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No. 00-1359

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

NEW HORIZON OF NEW YORK, LLC,

Petitioner,

vs.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; RUTH SCHARF,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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In Respondents' Brief in Opposition to the Petition for Writ of Certiorari, several new matters are presented to which the Petitioner is entitled to reply.

I. Federal Question Jurisdiction for Contempt of Court and Supplemental Jurisdiction for Pendent State-Law Claims Were Properly Presented to the Lower Court.

Respondents argue in their Brief (pp. 5-8) that Petitioner failed to present its claim for contempt of court and supplemental jurisdiction as a basis for federal jurisdiction in the courts below. This contention is incorrect. As acknowledged by Respondents, New Horizon's complaint included a separate and independent count for civil contempt, alleging the knowing, willful, and contumacious violation of the Order of the Bankruptcy Court. This claim sought the full measure of damages and was not, as Respondents would characterize it, "only alleged as grounds for additional penalties for sanctions against the Respondents." (Brief at p. 6)

The civil contempt claim survived multiple motions to dismiss and for summary judgment. During the course of these motions, New Horizon argued that the civil contempt count provided a basis for the "exclusive jurisdiction" of the trial court. (See "Plaintiff's Opposition to Motion to Dismiss for Subject Matter Jurisdiction," Supplemental Appendix at pp. 12-13.) The trial judge denied all of Respondents' motions and heard evidence relating to the contempt claim during the jury trial and then heard an additional day of evidence with regard to the contempt claim after the jury trial concluded. Six months after the trial ended, the trial judge ultimately ruled that even though the Defendants had committed "egregious" acts which "may be deserving of punitive sanctions," there was insufficient proof that Defendants had violated a specific order of the Bankruptcy

Court. (See Order of the Honorable W. Earl Britt, Appendix p. 34.)

On appeal, the Respondents did not address the contempt of court claim with regard to the jurisdictional argument in their initial brief and instead focused solely on the issue of "related to" jurisdiction under 28 U.S.C. § 1334(b). In its response brief, New Horizon likewise focused its argument on "related to" federal subject-matter jurisdiction, but also mentioned in several places the fact that one of the counts being tried before the district court was civil contempt of court.

At oral argument on June 6, 2000, the Fourth Circuit panel specifically inquired of counsel for New Horizon as to whether or not New Horizon contended that there was supplemental or pendent jurisdiction over state law claims which would be associated with the contempt claim. Counsel responded that New Horizon was, indeed, so contending. On June 12, 2000, counsel for New Horizon filed a supplemental document with the Fourth Circuit pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, which Rule expressly permits citation to pertinent and significant authorities "after oral argument but before decision." A copy of this supplemental filing is included in the Supplmental Appendix at pp. 18 - 105. The supplemental filing directly addressed New Horizon's contention that the contempt claim provided an independent basis for federal question jurisdiction and the basis for pendent jurisdiction over state law claims. Counsel noted that these issues had been raised during the course of oral argument. On June 23, 2000, counsel for the Respondents filed a response to Petitioner's June 12 supplemental filing, citing two cases regarding the jurisdictional issue. (See Supplemental Appendix at pp. 106 - 108.)

Nonetheless, in spite of raising it at oral argument, the Fourth Circuit panel ignored this additional basis for jurisdiction, which was both briefed and argued. The opinion of the Fourth Circuit does not address federal

question jurisdiction over the contempt of court claim and supplemental jurisdiction for the state-law claims. On November 14, 2000, New Horizon filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. (See Supplemental Appendix at pp. 109 - 130.) The Petition addressed the failure of the Fourth Circuit to consider contempt of court and supplemental jurisdiction. The Fourth Circuit ignored these arguments and denied the Petition for Rehearing. (Appendix p. 80)

Thus, this jurisdictional argument was appropriately presented and highlighted to the Fourth Circuit. A close examination of Respondents' arguments on this issue reveals that there is no substantive basis upon which they can contest it. It is clear that a federal court has original jurisdiction over a claim for civil contempt of its own order. It is also clear that the federal court has subject matter jurisdiction over state law claims arising out of the exact same nucleus of operative facts. This tenet has been well-settled since *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), and has been subsequently codified in 28 U.S.C. § 1367(a).

Finally, Respondents highlight in their Brief that the Fourth Circuit found that the contempt claim was "a collateral attack on a final order of the Bankruptcy Court" – implying that the claim should have been dismissed on that basis in the trial court. (Brief at p. 8) This finding, however, made for the first time on appeal, cannot and should not retroactively deprive the trial court of subject matter jurisdiction over the entire case. Whether or not the contempt claim was ultimately sustained at trial or thereafter does not determine the Court's original or supplemental jurisdiction. It should be noted that because the trial judge ultimately denied the contempt claim, it was never brought forward on appeal and never briefed on its merits in the Fourth Circuit. Thus, the Fourth Circuit devised its characterization of the "collateral attack" effect of the contempt claim without the benefit of any briefing by any of the parties. Even if the Fourth Circuit's conclusions about

collateral estoppel are correct (which Petitioner disputes), such conclusions regarding the legal merits of the federal contempt claim would not have the effect of depriving the trial court of its supplementary jurisdiction over the state-law claims. *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, 108 S. Ct. 614, 619, 98 L.Ed.2d 720 (1988); *Rosado v. Wyman*, 397 U.S. 397, 404-05, 90 S. Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970); *Shanaghan v. Cahill*, 58 F.3d 106, 109-10 (4th Cir. 1995); *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993).

II. Respondents Misstate the Facts Presented Below with Regard to "Related To" Bankruptcy Jurisdiction.

Respondents state as follows:

> By the time New Horizon filed its case, the notes were no longer even possessed by either bankrupt estate. Nor could the verdict in New Horizon's case have affected the notes or their ownership in view of the nature of New Horizon's claims.

Respondents' Brief at p. 9. These statements are untrue and reflect a misunderstanding of the evidence presented at trial and New Horizon's claims.[1] New Horizon filed its lawsuit in February 1997. The promissory notes were then possessed by the Tudor bankruptcy trustee, who was actively marketing them for sale to the highest bidder inasmuch as the exclusive option to purchase by New Horizon had just

[1] Appellate counsel for Respondents did not participate in the trial below.

expired. As noted in the Petition for Writ of Certiorari (pp. 13-14), numerous arguments were being made by the Petitioner and Respondents at the time of filing of the lawsuit as to the validity of the Plan of Reorganization, the interpretation of the Plan of Reorganization, and the propriety of New Horizon as a potential purchaser of the notes. Any of these matters could have affected the sale of the notes, the ownership of the notes, and the purchase price of the notes, which would ultimately be the primary source of funding for the Bankruptcy Plan. Thus, the Fourth Circuit's decision in fact contravenes the numerous cases from other circuits recited by Respondents in their Brief (at pp. 9-10) including *Matter of Xonics, Inc.*, 813 F.2d 127 (7th Cir. 1987) and *In re Lemco Gypsum, Inc.*, 910 F.2d 784 (11th Cir. 1990). There can be no doubt that as of the date of filing of the lawsuit, the New Horizon dispute "could conceivably have ... effect" on the amount of property available for distribution to creditors and the allocation of assets among creditors. *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.6 (1995).

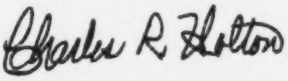
CONCLUSION

The Fourth Circuit's decision wrongfully ignores basic principles of pendent and supplemental jurisdiction which have been well-established by statute and by this Court for many years. The decision is an aberration which should not be permitted to stand as new precedent limiting federal jurisdiction over pendent state-law claims. Similarly, the Fourth Circuit's decision ignores the broad statutory jurisdictional grant given by 28 U.S.C. § 1334(b) over matters related to bankruptcy cases as well as the broad standards for judicial application of § 1334(b) established by this Court in *Celotex Corp. v. Edwards*, *id.* The precedent of withdrawal of federal jurisdiction over matters clearly arising out of and related to bankruptcy cases and requiring those matters to be litigated in state court while the bankruptcy

cases are being actively administered, could result in significant chaos and interfere substantially with the ability of federal courts to enforce and police their Orders and Plans.

Wherefore, Petitioner New Horizon of New York LLC requests the Court to grant its Petition for a Writ of Certiorari.

Respectfully submitted, this 7th day of May, 2001.



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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No.:5:97-CV-126-BR(2)

NEW HORIZON OF NY LLC,	)
Plaintiff,	)
v.	)
ROBERT JACOBS, et al,	)
Defendants.	)

PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS FOR SUBJECT MATTER JURISDICTION AND PLAINTIFF'S MOTION FOR SANCTIONS AND MEMORANDUM IN SUPPORT

The Plaintiff, New Horizon of New York, LLC, ("New Horizon"), by and through counsel, submits this Opposition to Defendants Robert Jacobs, Elliot Jacobs, Allan Mirwis, E.J. Servicing Inc., E.J. Realty Management Corp., and E.J. Property Consultants' ("Defendants") Motion to Dismiss For Lack of Subject Matter Jurisdiction, and moves the Court to impose sanctions against the Defendants for filing this frivolous and delaying motion.

PRELIMINARY STATEMENT

On March 18, 1997, these Defendants filed a motion requesting this Court to refer this matter to the bankruptcy court for determination.[1] This Court entered its order of referral on June 20, 1997, pursuant to the August 3, 1984 Standing Order. The same Defendants now move to dismiss this case for lack of subject matter jurisdiction, ten calendar days before trial is to begin. Defendants contend that they had heretofore assumed this case was "related to" a case arising under Title 11 "because they wanted to have this case referred to Bankruptcy Court, believing that court would be the forum most favorable to a plea of *res judicata*." (Defendants' Memorandum at 2). Though the bankruptcy court initially ruled against the Defendants on their *res judicata* allegations (discussed more fully, infra) in August 1997, Defendants have unjustifiably waited until one week before trial to challenge this Court's jurisdiction. It is evident that the Defendants agreed there is subject matter jurisdiction when it was convenient, and raise this issue now only in a last-ditch effort to delay the trial. The motion is without merit and must be dismissed and sanctions imposed.

FACTS

This case has evolved from the bankruptcy proceeding of AJ & AJ Servicing, Inc., a corporation owned by the Jacobs Group of Defendants, many of whom are the moving Defendants with respect to this motion. AJ & AJ Servicing filed bankruptcy after several judgments were entered, totaling over $13 million, against it and other individuals related to the corporation.

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[1] In the first motion, Defendants argued that this Court needed to dismiss the action because it was "related to" a bankruptcy proceeding.

After several years of extensive proceedings and negotiations, all the parties to the bankruptcy reached a settlement and compromise, which was approved by the Bankruptcy Court and incorporated into the terms of the Plan of Reorganization. On September 26, 1996, Judge Leonard entered the Order Confirming Plan in the AJ bankruptcy. Several portions of the Plan are relevant to this action: First, the judgments entered against the Jacobs Group were to be vacated shortly after confirmation. Second, title to certain wraparound mortgage notes held by AJ was to be transferred to another bankruptcy debtor, Tudor II. Following that conveyance, Tudor II was to grant an option to purchase the wraparound notes to New Horizon of NY, LLC, the Plaintiff herein. The provisions of the option were attached as letter agreements to the Plan of Reorganization, and incorporated into the Plan through the Order Confirming Plan. In addition, the limited partner Defendants received certain other benefits from the Plan of Reorganization.

Following the confirmation of the Plan, the Defendants proceeded to receive the benefits imparted to them under the Plan, including the vacation of the judgments, the extension of the mortgage under the wrap notes, and others. At the same time, however, the Defendants took steps (including the institution of a baseless appeal to this Court, the purpose of which was to hinder financing and closing on the option) to sabotage the benefits conferred upon New Horizon, as more fully set forth in the Amended Complaint, the Pretrial Order, and the Plaintiff's Memorandum of Authorities on Contested Issues of Law.

Plaintiff's contentions in this lawsuit are that the Defendants' efforts to sabotage certain elements of the Plan (1) breached the Plan of Reorganization, which is a contract under the law, (2) tortiously interfered with the option agreement entered into between Tudor II and New Horizon; (3) constitute civil contempt of the court's Order confirming

the plan of reorganization; (4) constitute abuse of process; (5) amount to malicious prosecution; and (6) are unfair and deceptive trade practices under Chapter 75 of the North Carolina General Statutes. In addition, Plaintiff contends that these acts subject Defendants to treble and/or punitive damages. Plaintiff also contends that the Defendants committed a fraud on the Bankruptcy Court, by consenting to the Plan (some of them specifically appearing in Court and making representations to the Court, others by their consent through their agents), while secretly harboring opposition to the benefits going to New Horizon and an intent to undermine the benefits.

The issues involved in this case go to the very integrity of the bankruptcy proceeding, to the integrity of the Orders entered by this and the Bankruptcy Court, and to the abusive misuse of federal court proceedings, and must be resolved by this Court.

ARGUMENT

I. THIS COURT HAS SUBJECT MATTER JURISDICTION.

A. This Case Arises Out Of Or Relates To A Proceeding Under Title 11.

Title 28 U.S.C. § 1334(b) grants jurisdiction to the district courts over "all civil proceedings arising under title 11 or arising in or related to cases under title 11." "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters within the Bankruptcy estate." Celotex Corp. v. Edwards, 514 U.S. 300, 308, 115 S. Ct. 1493, 1499, 131 L. Ed. 2d 403 (1995) (citing Pacor, Inc. v.

Higgins, 743 F.2d 984 (3d Cir. 1984)). The "related to" language gives district courts and bankruptcy courts "jurisdiction over more than simple proceedings involving the property of the debtor or the estate." Id. Indeed, this Court has already ordered that "this matter is related to cases having arisen under Title 11" in conjunction with the ***Defendants***' motion to refer the case to the bankruptcy court. June 20, 1997 Order of Referral. In addition, all counsel agreed that the bankruptcy court has jurisdiction in the Joint Preliminary Conference Report of October 1997 (after Judge Leonard denied the 12(b)(6) motion), and Judge Leonard found that the bankruptcy court has jurisdiction in his September 9, 1998 Order denying Alan Jacobs' motion for summary judgment.

As noted above, the very integrity of the orders of this Court, the bankruptcy court and the bankruptcy proceedings, as well as the proceedings of this Court, are at issue here. The question to be addressed by the jury and this Court is whether parties to a bankruptcy can consent to a Plan, take their benefits, and seek to undo the benefits to others though the use of the appellate process, among other tactics. This case also revolves around an appeal taken to this Court, the abuse of this Court's and the bankruptcy court's procedures, and this Court's dismissal of the appeal. If this Court does not have jurisdiction to hear these matters, it renders the bankruptcy procedure meaningless and provides a forum for abuse, as the court's orders could never be adequately enforced and this Court's procedures could not be adequately protected.

The Fourth Circuit has adopted the Third Circuit test set forth in Pacor for determining the existence of "related to" jurisdiction. It provides

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.

In re Celotex Corp., 124 F.3d 619, 625-626 (4th Cir. 1997) (citing Pacor, 743 F.2d at 994).

Because the debtor is not a party to this adversary proceeding, Defendants wrongly assert that the outcome of this proceeding could not conceivably have any effect on the estate in bankruptcy. This assertion, along with all other arguments made by the Defendants related to this motion, ignores the Plaintiff's contention that the Defendants are in contempt of the bankruptcy court's Confirmation Order of September 26, 1996. Under the broad contempt powers given to the courts, one of the conceivable remedies this Court might grant is to undo part or all of the Plan. Because the Pacor test "does not require certain or likely alteration of the debtor's rights, liabilities, options or freedom of action . . . [but only] ***the possibility*** of such alteration or impact," the fact that this remedy is conceivable is sufficient to confer jurisdiction on this Court. See Celotex, 124 F.3d at 626 (emphasis added). See also In re Titan Energy, Inc., 837 F.2d 325, 330 (8th Cir. 1988) ("[E]ven a proceeding which portends a mere contingent or tangential effect on a debtor's estate meets the broad jurisdictional test articulated in Pacor.").

Defendants also contend that this is an action "seeking damages for alleged post-confirmation breach of post-confirmation rights . . . [with] no relation to the bankruptcy or the administration of the estate." Defendants' Memorandum at 9. Thus, according to the Defendants, this Court has no bankruptcy subject matter jurisdiction. In a case remarkably similar to the one at bar, the United States District Court for the District of Utah found that the bankruptcy court did have subject matter jurisdiction over an agreement between a creditor and a third party, where the agreement was attached to and approved as part of the debtor's Chapter 11 plan. In re Terracor, 86 B.R. 671 (D. Utah 1988). See also In re Greenley Energy Holdings of Pennsylvania, Inc., 110 B.R. 173, 184 (Bankr. E.D. Pa. 1990), cited by Defendants at p. 10, acknowledging that had the agreements at issue been attached or referenced in the plan, it might bring their interpretation within the jurisdiction of the court; In re Coastal Petroleum Corp., 142 B.R. 177, 180-181 (Bankr. N.D. Ohio 1992), cited by Defendants at p. 13, noting that the agreement in suit was not part of the confirmed plan.

In Terracor, the debtor, one of Utah's largest real estate developers, filed a chapter 11 bankruptcy after a major creditor (Senior) sued Terracor and its subsidiaries in numerous jurisdictions, with a claim of over $118,000,000.00. Part of the chapter 11 plan provided that upon confirmation, the debtor would transfer all of certain property to Senior in return for cash advances and a reduction in Senior's claim. Thereafter, the debtor would have no further interest in or responsibility for that property. In fact, the property was transferred to the creditor as required by the plan. Id. at 674.

The plan also incorporated by exhibit a separate contract, "which complimented and clarified the Plan" and was executed by several of the parties. Id. The agreement essentially provided that a portion of the property be

transferred from the debtor to Senior, and then later transferred to an identified third party. The agreement provided that all disputes were to be resolved pursuant to the laws of the State of Colorado, and also provided that upon confirmation of the plan, letters of credit were to be given to the third party who was ultimately to hold the property. Id. Subsequent to the confirmation of the plan, nothing occurred for almost five years after confirmation, at which time the third party filed a motion to order performance of the chapter 11 plan, requesting that the court order the creditor to convey the property as set forth in the plan and agreement. The creditor then filed a motion to dismiss for lack of subject matter jurisdiction. Id. at 673-374.

The court found that the interpretation of the agreement would be under state law, that the agreement was an attachment to the plan, and was a self-contained document relating to the real property transferred from the debtor at confirmation. "As an attachment, the Agreement did concern the Plan, but now the resolution of these disputes will not effect the reorganized debtor. This is only a dispute between Senior and [the third-party recipient]." Id. at 675. The court, however, found that it did have jurisdiction over the dispute. The court noted first that "jurisdiction extends over post-confirmation proceedings regarding rights arising under the confirmed plan." Id. (citing In re Fortner Oilfield Services, Inc., 49 B.R. 9, 10 (Bankr. N.D. Texas 1984)). The court further noted that the court could direct any party to perform any act necessary for the consummation of the plan under 11 U.S.C. § 1142. Id. The court disagreed with Senior's interpretation of that statute (that it would not confer jurisdiction), holding that "the clear intent of section 1142(b) is for the court to retain its jurisdiction to assure that the terms and provisions of the confirmed Chapter 11 Plan are carried out until the Plan is completed and a final decree is entered closing the case." Id. at 675-676.

The court also noted that the plan itself retained jurisdiction in the bankruptcy court, thus providing an additional basis for the finding that subject matter jurisdiction does exist. The court further noted that the creditor disputing subject matter jurisdiction "was an active participant in the confirmation process and Senior has at least impliedly consented to the retention of this court's jurisdiction as set forth in the Plan." Id. at 676.

Finally, the court held that

> the issues raised by the parties appear to be, in part, proceedings that request this Court to interpret provisions of the Plan confirmed by this court. The enforcement or interpretation of plan provisions are integral to the bankruptcy case. Any matters which this court could be called upon to decide in interpreting the intent of the parties in the formulation of the Plan, would require retention of this Court's jurisdiction. ***The court always retains jurisdiction to review and interpret its own orders.***

Id. at 677 (emphasis added).

The issues in the Terracor case regarding subject matter jurisdiction are nearly identical to those raised here, in that both cases involve the interpretation of agreements attached to and incorporated as part of the plan, though the agreements may not specifically deal with property of the estate. In both cases, the debtor conveyed the property as required, and the dispute involves the subsequent conveyance of the property to a third party. In both cases, the parties consented, through their consent to the Plan, to the bankruptcy court's continuing jurisdiction. The distinction in this case is in New Horizon's favor; that is,

New Horizon has a cause of action for contempt based on the Defendants' sabotaging the closing on the option purchase, as set forth in the AJ Plan.[2] Thus, there are federal issues involved, and not simply interpretation of state laws and state torts,[3] which also distinguishes this case from those cited by Defendants, Matter of Leeds Bldg. Products, Inc., 160 B.R. 689, 691 (Bankr. N.D. Ga. 1993) (court notes no question of bankruptcy law involved), and In re H&L Developers, Inc., 178 B.R. 71, 76 (Bankr. E.D. Pa. 1994) (complaint asserted no bankruptcy or other federal law claims).

In addition, the AJ Plan had not been fully consummated in February 1997, when this action was filed. In fact, the sale of the notes was integral to the funding of the Plan, which did not occur until September 1997. If the "related to" jurisdiction existed at the time this action was filed, subsequent transactions effectuating the Plan do not divest this Court of jurisdiction. See In re Celotex Corp., 124 F.3d 619, 626 (4th Cir. 1997); See also Freeport-McMoRan, Inc. v. K N Energy, Inc., 498 U.S. 426, 428, 111 S. Ct. 858, 859, 112 L. Ed. 2d 951 (1991) (if a federal court possesses subject matter jurisdiction over an action at the time it is commenced, a subsequent event cannot divest the court of that subject matter jurisdiction).

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[2] Here, there are numerous questions of bankruptcy and federal law, including the effect of a bankruptcy plan, the interpretation of the plan, an understanding of the alignment of parties in a bankruptcy proceeding and an appeal from an order of the bankruptcy court, and contempt, among others.

[3] Though the Terracor court found that it did have subject matter jurisdiction, it permissibly abstained from hearing the dispute. Abstention would not be appropriate in this case, as, first, the Defendants have not moved for abstention; and second, abstention is only appropriate upon "timely motion," presumably something more than 10 days before trial. 28 U.S.C. § 1334(b)(2).

B. The Bankruptcy Court Retained Jurisdiction In The Plan.

On September 26, 1996, the Bankruptcy Court confirmed the Chapter 11 Plan of reorganization of AJ & AJ Servicing, Inc. Article XIV of the Plan provides specifically for the bankruptcy court's retention of jurisdiction for "including, but not limited to, the following purposes:

* * *

> (e) To enforce and interpret the terms and conditions of this Plan in each and every respect and to issue such orders, including injunctions, as may be necessary to enforce the Plan; To resolve and determine all questions and disputes regarding interpretation of the Plan; and to implement the Plan.
>
> * * *
>
> (j) To determine all disputes, controversies, conflicts, and adversary proceedings, whether or not subject to action pending as of the Confirmation Date.

Clearly, the court retained jurisdiction over interpretation of the Plan. Several of the Plaintiff's causes of action require interpretation of the provisions of the Plan; specifically, whether the Defendants were prohibited from taking actions to interfere with the Plaintiff's receipt of the benefits it was to receive thereunder.

The court's retained jurisdiction extends to "such complementary and auxiliary jurisdiction of the court to protect its original confirmation decree, prevent interferences with the execution of the plan, and otherwise aid in its operation." North American Car Corp. v. Peerless Weighing & Vending Machine Corp., 143 F.2d 938, 940 (2d Cir. 1944) (citation omitted). Certainly actions arising out of parties' attempts to sabotage elements of the Plan fall within the clearly retained jurisdiction of the bankruptcy court.

C. This Court Must Hear Plaintiff's Claim for Contempt.

One of Plaintiff's causes of action is Defendants' civil contempt of the September 26, 1996 Confirmation Order. Federal courts have exclusive jurisdiction over contempt proceedings of their own orders.[4] However, the district court may hear a contempt proceeding as it relates to a bankruptcy order: an order of the bankruptcy court is an order of both courts, as the bankruptcy court is a "unit" of the district court.[5] See United States v. Guariglia, 962 F.2d 160,

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[4] Contempt of a confirmation order can be a cause of action in a civil suit. See Turner v. Mellon Mortgage Co. (In re Turner), 221 B.R. 920 (Bankr. M.D. Fla. 1998).

[5] It is interesting to consider the Defendants' various allegations regarding the jurisdiction of the courts over the contempt issue; in their appeal from Judge Leonard's summary judgment order they contend that only Judge Leonard could rule on contempt of his order, and that his referral to this Court for further consideration after the facts are developed at trial was error. Now, they contend that this Court has no jurisdiction because it is not "related to" a bankruptcy proceeding, which, obviously, would also divest the bankruptcy court of jurisdiction. This is the typical doublespeak that these Defendants have adopted in their desperate attempts to avoid facing trial next week.

162-63 (2d Cir. 1992). Obviously, based on the Plaintiff's contempt cause of action, this Court has not only permissive jurisdiction, but also exclusive jurisdiction.

Defendants contend that this Court should dismiss the contempt cause of action, as Judge Leonard determined the contempt issue on February 3, 1997. This is at least the fourth time that the Defendants have raised this issue in this case. First, this was the subject of their Rule 12(b)(6) Motion, on which Judge Leonard ruled in August 1997. At that time, he conclusively determined that he had not considered the contempt issue, and there was no *res judicata*. Defendants again raised the *res judicata* issue in their summary judgment motions and in their motions to continue. In fact, the *res judicata* in this case is that the contempt issue has not yet been ruled upon. Defendants' continuing to raise this issue is in blatant disregard of the orders already entered in this case, and may itself be contempt.

The Defendants continue to mischaracterize Judge Leonard's ruling on February 3, 1997. In his order, Judge Leonard refused to extend the option period, finding that North Carolina option law would not allow an equitable extension, no matter what the cause of the failure to close. As a result, he never reached the question why the option failed, and did not address the motion for contempt. Judge Leonard's August 5, 1997 ruling clearly states "***the court never considered the allegations underlying the contempt motion and did not adjudicate it,***" (emphasis added), and Judge Leonard has repeatedly noted that an issue not actually considered cannot form the basis of *res judicata*. Thus, the Plaintiff's claim of contempt remains. As a result, this Court has subject matter jurisdiction over the contempt claim, and must retain jurisdiction over this matter.

II. DEFENDANTS SHOULD BE SANCTIONED FOR FILING YET ANOTHER DELAYING MOTION.

Since Defendants' counsel filed their Notice of Appearance on September 11, 1998, in addition to this motion,[6] they have employed the following tactics to delay the trial of this matter and to distract counsel for the Plaintiff from preparing for trial, among others not listed:

- On September 14, 1998, they filed a Motion To Continue certain hearings scheduled for September 18, 1998, which had previously been continued from August 24, 1998 to accommodate the substitution of counsel, necessitating a lengthy opposition.
- On September 16, 1998, Defendants purported to subpoena the custodian of records of Moore & Van Allen, PLLC, seeking all of Moore & Van Allen's bills and invoices related to this matter, necessitating a Motion to Quash and for Protective Order.
- On September 30. 1998, Defendants filed three separate Notices of Appeal from Judge Leonard's interlocutory Order of September 23, 1998 denying all motions for summary judgment related to Jacobs Defendants (except Alan Jacobs), requiring Plaintiff to file a Motion to Dismiss and Memorandum in Support.
- On October 6, 1998, Defendant Elliot Jacobs filed a Motion To Strike one paragraph of the Amended Complaint regarding damages, and an alternative motion to add Moore & Van Allen as a necessary party, necessitating an Opposition.

---

[6] Further evidence of this motion's frivolity is the Defendants' decision to file it before checking its authorities. See October 28, 1998 letter.

- On October 6, 1998, Defendants filed a Motion To Compel "Key Dispositive Documents," which led to numerous letters explaining that those documents had already been the subject of previous motions, and eventually required the preparation of an Opposition.
- On October 6, 1998, Defendants filed a motion with this Court to continue the trial, which required Plaintiff to prepare another lengthy Opposition, setting forth for this Court the history of this case.
- On October 6, 1998, Defendants filed a Motion For Leave of Court to Proceed with Discovery, including taking five discovery depositions (of witnesses who had previously been deposed) and an additional Rule 34 Request for Production of Documents, which necessitated an Opposition.
- On October 9, 1998, Defendants subpoenaed Mr. Sonnenschine (a manager of the Plaintiff), Mr. Taub (a manager of the Plaintiff), and Mr. Sabo (a previously unidentified witness) to "for trial" depositions in New York for October 21, 1998. This was in addition to the discovery motion seeking to depose Mr. Sonnenschine, and despite Plaintiff's counsel's assurances that Mr. Sonnenschine would appear for trial. Thus, Plaintiff was required to prepare a Motion to Quash those notices of deposition.
- On October 12, 1998, Defendants identified four Moore & Van Allen attorneys as witnesses for trial, in an effort to harass Plaintiff and its counsel, and necessitating a motion in limine.
- In their Motion To Continue Trial, as well as in correspondence with Plaintiff's counsel, Defendants have raised multiple baseless allegations of conflicts on the part of Plaintiff's counsel, to which counsel has spent a great deal of time preparing a response.

- On October 23, 1998, Defendants filed the instant Motion To Dismiss for Lack of Subject Matter Jurisdiction, raising an issue of *res judicata* (regarding the contempt issues alleged in the Amended Complaint) for approximately the fourth time in this action, requiring the Plaintiff to address this issue again, as well as to prepare this Opposition.
- On October 26, 1998, Defendants filed six Motions In Limine, five of which seek to reargue Defendants' summary judgment motions, all of which have been denied.
- On October 27, 1998, Defendants filed two additional (untimely) motions in limine, an untimely "Amended Trial Brief," and yet another (untimely) motion for summary judgment, requiring Plaintiff to respond and move to strike these new filings.

With the exception of (1) ordering two documents to be produced by Plaintiff and (2) ordering that Mr. Taub's "for trial" deposition be taken unless Mr. Taub could guarantee his appearance for trial, either the bankruptcy court or this Court has denied each of the above-referenced motions (save the pending motion to dismiss), and has quashed all of the subpoenas except for Mr. Taub's (the subpoena for Mr. Sabo was withdrawn, but not until Plaintiff had filed its Motion to Quash the Notice of Deposition). Counsel for Plaintiff has spent hundreds of hours in the three weeks prior to trial responding to these motions, all of which were filed with the intent to delay trial, to harass, and to distract Plaintiff's counsel from preparing for trial.

Local Rule 4.10, E.D.N.C., provides that the Court may assess costs against the party or counsel filing frivolous or delaying motions. In addition, a district court has inherent authority to sanction parties acting in bad faith, vexatiously, and wantonly. Chambers v. Nasco, Inc., 501 U.S. 32, 111 S.

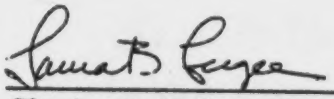
Ct. 2123, 115 L. Ed. 2d 27, reh'g denied, 501 U.S. 1269, 112 S. Ct. 12, 115 L. Ed. 2d 1097 (1991). The cumulative effect has been overwhelming. It appears that from the standpoint of the Defendants, who may ultimately be assessed attorneys' fees in this action, they have nothing to lose by continuing to file frivolous and delaying motions in an effort to have this case taken off the trial calendar for November 2. Thus, the Plaintiff requests the Court to sanction counsel and the Defendants for their egregious abuses.

CONCLUSION

WHEREFORE, the Plaintiff respectfully requests the Court to enter an Order (1) denying the Defendants' motion to dismiss; (2) sanctioning the Defendants and/or Defendants' counsel for the cumulative effect of their delaying motions, including a reasonable attorney's fee for opposing this frivolous motion; and (3) granting such other relief as the Court may deem necessary and just.

This 29th day of October, 1998.

Respectfully submitted,



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June 9, 2000

FILED

JUNE 12 2000

U.S. Court of Appeals
Fourth Circuit

VIA FEDERAL EXPRESS

Ms. Patricia S. Connor
Clerk, Fourth Circuit Court of Appeals
Lewis F. Powell, Jr. U.S. Courthouse Annex
1100 East Main Street, Suite 501
Richmond, VA 23219-3517

RE: New Horizon of NY LLC v. Robert Jacobs, et al.
U.S.C.A. No. 99-1990 and 99-1996

Dear Ms. Connor:

On behalf of the Appellee, New Horizon of New York, LLC, and pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Local Rule 28(e), we draw the Court's attention to the following authorities on the issue of claims of contempt for damages as an independent basis for federal question jurisdiction and the importance of having a bankruptcy judge review and interpret its own orders: 18 U.S.C. § 401; In re General Motors Corp., 61 F.3d 256 (4th Cir. 1995); Folk v. Wallace Business Forms, Inc., 394 F.3d

240 (4th Cir. 1968); Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d 933 (4th Cir. 1997). United States v. Guariglia, 962 F.2d 160 (2nd Cir. 1992), discusses the district court's jurisdiction to hear claims related to the contempt of a bankruptcy court order. Finally, in Ridenhour, et al. v. Andrews Federal Credit Union, et al., this Circuit addressed a district court's pendent jurisdiction over state law claims. 897 F.2d 715, 722 (4th Cir. 1990). These supplemental authorities address issues raised by the panel during oral argument regarding federal subject matter jurisdiction.

Also pursuant to Local Rule 28(e), I am enclosing an additional three copies of this letter for filing, as well as an extra copy. Please return the extra copy, stamped "filed," to my attention in the enclosed self-addressed stamped envelope. I am also providing opposing counsel with copies of this letter.

Thank you in advance for your attention to this matter.

Very truly yours,

MOORE & VAN ALLEN, PLLC

Laura B. Luger

cc: Nathan Lewin, Esq.
James Exum, Esq.
Paul Sun, Esq.
Robert Jenkins, Esq.

18 U.S.C.A. § 401

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 21--CONTEMPTS

§ 401. Power of court

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 2948, c. 645, 62 Stat. 701.

Historical and Revision Notes

Reviser'sNote. Based on section 385 of Title 28, U.S.C., 1940, ed., Judicial Code and Judiciary (Mar. 3, 1911, c. 231, § 268, 36 Stat. 1163 [Derived from R.S. § 725]).

Said § 385 conferred two powers. The first part authorizing courts of the United States to impose and administer oaths will remain in said Title 28. The second part relating to contempt of court constitutes this section.

Changes in phraseology and arrangement were made. 80th Congress House Report No. 304.

Cross References

Foreign witness, contempt by, see section 1784 of Title 28 Judiciary and Judicial Procedure.

Garnishee, failure to appear at term for which summoned, as contempt, see section 2405 of Title 28, Judiciary and Judicial Procedure.

Obstruction of justice, see section 1501 et seq. of this title.

Federal Rules of Criminal Procedure

Prosecution of criminal contempt by summary disposition or notice and hearing, see rule 42.

Statutory provisions defining criminal contempts, see Notes of Advisory Committee on Rules, rule 42.

61 F.3d 256

In re GENERAL MOTORS CORPORATION,
a Delaware Corporation, Petitioner.

No. 94-1011.
United States Court of Appeals,
Fourth Circuit.
Aug. 8, 1995.

Car manufacturer moved for order holding opposing counsel in civil contempt for violating prior court order prohibiting citation to lower court findings entered by the United States District Court for the District of South Carolina, G. Ross Anderson, Jr., J. The Court of Appeals held that counsel would be held in contempt and ordered counsel to pay for manufacturer's expenses related to correcting effects of the misconduct, as well as attorney fees and costs for the contempt proceeding.

So ordered.

1. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.

[See headnote text below]

1. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.4 1995.

Court of Appeals may impose sanctions for civil contempt to coerce obedience to court order or to

compensate complainant for losses sustained as result of the contumacy.

2. CONTEMPT k20
93 ----
93I Acts or Conduct Constituting Contempt of Court
93k19 Disobedience to Mandate, Order, or Judgment
93k20 In general.
C.A.4 1995.
Civil contempt is appropriate sanction if Court of Appeals can point to its own order that sets forth in specific detail unequivocal command that party has violated.

3. CONTEMPT k60(1)
93 ----
93II Power to Punish, and Proceedings Therefor
93k60 Evidence
93k60(1) Presumptions and burden of proof.
C.A.4 1995.
Burden is on the complainant to prove civil contempt by clear and convincing evidence.

4. CONTEMPT k20
93 ----
93I Acts or Conduct Constituting Contempt of Court
93k19 Disobedience to Mandate, Order, or Judgment
93k20 In general.
C.A.4 1995.
Counsel litigating many claims against car manufacturer would be found in civil contempt for violating specific and unequivocal commands of Court of Appeals' order, which struck inappropriate findings of lower court and

expressly ordered that specified portions of lower court's order were not to be cited as authority; counsel cited to the stricken findings in another court proceeding involving the manufacturer.

5. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.
C.A.4 1995.

Appropriate remedy for civil contempt is within court's broad discretion.

6. CONTEMPT k68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.

[See headnote text below]

6. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.
C.A.4 1995.

Remedies for civil contempt include ordering contemnor to reimburse complainant for losses sustained and for reasonable attorney's fees.

7. CONTEMPT k70
93 ----
93III Punishment
93k70 Nature and grounds in general.
C.A.4 1995.

Civil contempt remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive.

8. CONTEMPT k68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.

[See headnote text below]

8. CONTEMPT k74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.4 1995.

As result of counsel's contumacious behavior in violating Court of Appeals' order that stated that lower court's inappropriate findings could not be cited as authority, car manufacturer against whom counsel was litigating was entitled to be compensated for its expenses germinating from the misconduct and to reasonable costs and attorney's fees for the contempt proceeding.

ORDER

On September 14, 1994, petitioner, General Motors Corporation (GM) commenced the instant proceedings by moving this court for an order requiring plaintiffs' counsel, Mr. James E. Butler, Jr. (Butler), to show cause why this court should not hold him in civil contempt, or impose other appropriate sanctions, for violating this court's order of March 23, 1994. On October 6, 1994, this court granted GM's motion and held a hearing on October 20, 1994, in order for Butler to show cause why he should not be held in

contempt. For reasons that follow, we hold Butler in civil contempt of this court's order of March 23, 1994.

I

On February 28, 1994, the Honorable G. Ross Anderson entered a fifty-nine page order recusing himself from further participation in Cameron v. General Motors Corp., Nos. 6:93-1278-3, 1279-3, 1280-3, 1994 WL 159408 (D.S.C. Feb. 28, 1994). In recusing himself, Judge Anderson held that a reasonable person could possibly question his "fairness and impartiality," and he accordingly vacated five outstanding discovery orders. Recusal Order at 59. In the order, Judge Anderson also made new findings of fact and conclusions of law on the specific issues addressed in the discovery orders that he found necessary to vacate.

Due to its belief that Judge Anderson's new findings and conclusions would potentially prejudice its case, GM moved this court on March 4, 1994, for an order striking certain portions of the recusal order. On March 23, 1994, we granted GM's motion. In that order, we reasoned that it was improper for Judge Anderson to make new findings of fact and conclusions of law on the issues addressed in the vacated orders. Our March 23, 1994, order, stated in pertinent part:

As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Subsequently, the Honorable Charles H. Haden II was appointed to preside over the Cameron litigation.

Following this court's March 23, 1994, order, Butler continued his representation of other clients pursuing products liability actions against GM in other courts, including a state court proceeding in Fulton County, Georgia, see Moseley v. General Motors Corp., No. 90-V-6276 (Sup.Ct., Fulton County, Ga.). During the course of the Moseley litigation, Butler submitted a nine-page letter dated August 30, 1994, to the Honorable Albert L. Thompson, the presiding judge in the Moseley case. On page three of the letter in a block quotation, Butler quoted directly from language in Judge Anderson's order that this court had ordered stricken in its order of March 23, 1994. In particular, he quoted the same language that this court had used in its order to exemplify the inappropriate findings included in Judge Anderson's order. In quoting the language, Butler also highlighted certain words that were not emphasized in Judge Anderson's original order. Butler specifically quoted the following passage:

A review of the thousands of documents in this case including in camera reviews of documents for which an attorney-client privilege was asserted reveals a substantial likelihood that perhaps perjury and the systematic destruction of documents involving gross misconduct by General Motors' regional counsel occurred. Evidence of the commission of such activity by and with the knowledge of these General Motors' regional counsel would defeat the attorney-client and work product privilege asserted by General Motors. There is clearly evidence having a sufficient foundation in fact to establish a prima facie case that the documents for which an attorney-client privilege is asserted are subject to the crime fraud exception [to the attorney-client privilege].

Letter of Aug. 30, 1994, at 3 (emphasis in letter) (quoting Recusal Order at 48). After quoting this passage, Butler cited Judge Anderson's recusal order. He also attached a complete copy of the order to the letter. (FN1)

In the paragraph following the quoted language, Butler noted that Judge Anderson had vacated several of his discovery orders in the recusal order and stated that Judge Haden in the Cameron case had "reinstated several of Judge Anderson's prior orders." Id. at 3. Additionally, in footnote eight on page eight of the letter, Butler again referenced Judge Anderson's findings, stating that "Judge Anderson found many of GM's privilege claims to be baseless, and suggested that Rule 11 sanctions should be investigated based on GM's making of such claims." Id. at 8 n. 8. Nowhere in Butler's letter did he state that this court had stricken the portion of Judge Anderson's order he quoted and had ordered that the portion should not be cited as authority. Furthermore, nowhere in the letter did he mention that this court had stricken Judge Anderson's "findings" in relation to the liability of GM's counsel under Fed.R.Civ.P. 11.

Counsel for GM thereafter wrote Judge Thompson on September 2, 1994, and informed him that this court had stricken the language in the recusal order cited by Butler and had ordered that such findings in the order should not be cited as authority. The letter also advised Judge Thompson that Judge Haden had not reinstated the language stricken from Judge Anderson's recusal order. On September 20, 1994, Butler wrote to Judge Thompson apologizing for his "inexcusable and careless blunder" in including in his August 30 letter a "misleading and inaccurate" sentence, which implied that Judge Haden had adopted Judge Anderson's earlier findings that were quoted in his August 30 letter. Butler, however, did not state in the letter that this court had stricken the quoted passage from Judge Anderson's order and had ordered that the passage should not be cited as authority. Finally, on December 8, 1994, Butler sent a letter to Judge

Thompson, in which he expressly informed Judge Thompson that this court had stricken the portions he quoted in the August 30 letter. Butler explained that he had not notified Judge Thompson earlier because he believed Judge Thompson was "fully apprised" that the language had been stricken due to the fact that GM had informed him as such in its letter of September 2, 1994, and the fact that, in a status conference before Judge Thompson on September 8, 1994, neither party had raised the issue of the validity of Judge Anderson's findings. (FN2)

II

A

[1] [2] [3] We may impose sanctions for civil contempt "to coerce obedience to a court order or to compensate the complainant for losses sustained as a result of the contumacy." Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir.1988); see also United States v. United Mine Workers of America, 330 U.S. 258, 303-04, 67 S.Ct. 677, 701, 91 L.Ed. 884 (1947). Civil contempt is an appropriate sanction if we can point to an order of this Court which "set[s] forth in specific detail an unequivocal command" which a party has violated. Ferrell v. Pierce, 785 F.2d 1372, 1378 (7th Cir.1986) (citation and internal quotation marks omitted); see also Project B.A.S.I.C. v. Kemp, 947 F.2d 11, 16 (1st Cir.1991) ("[C]ivil contempt will lie only if the putative contemnor has violated an order that is clear and unambiguous."). The burden is on the complainant to prove civil contempt by clear and convincing evidence. Id. Willfulness is not an element of civil contempt. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949).

[4] We believe GM has satisfied its burden of demonstrating by clear and convincing evidence that Butler

violated the specific and unequivocal commands of our order of March 23, 1994. In that order, we stated:

> As a result, section III of the recusal order, as well as any other statements in the order relating to the possible destruction of documents, perjury by petitioner or petitioner's counsel, or applicability of the crime-fraud exception of the attorney-client and work-product privileges to the facts of this case, are hereby stricken from the order and should not hereafter be cited as authority. We also strike all findings or conclusions regarding the liability or culpability of petitioner's counsel with respect to the pending motion for sanctions under Fed.R.Civ.P. 11.

Order of March 23, 1994, at 2-3. Our order was clear and unequivocal. We struck Part III and other portions of Judge Anderson's recusal order as inappropriate, and expressly ordered that the specified portions of the order were not to "be cited as authority." Id. Despite this clear command, in his letter to Judge Thompson and brief filed on April 1, 1994, with the United States District Court in the District of Kansas in Cockrum v. General Motors Corp., No. 93-1180-MLB (D. Kan.), Butler cited and quoted directly from language in Judge Anderson's order that this Court had stricken. In our view, the evidence clearly and convincingly establishes that Butler violated our clear and unequivocal order of March 23, 1994.

B

[5] [6] [7] The issue is now one of remedy. The appropriate remedy for civil contempt is within the court's

broad discretion. McComb, 336 U.S. at 193-94, 69 S.Ct. at 500-501. Remedies include ordering the contemnor to reimburse the complainant for losses sustained and for reasonable attorney's fees. United States v. Trudell, 563 F.2d 889, 891 (8th Cir.1977). However, the remedies and sanctions must be remedial and compensatory and, unlike criminal contempt, nonpunitive. United Mine Workers, 330 U.S. at 302-04, 67 S.Ct. at 700-701. "Generally, a compensatory sanction 'may not exceed the actual loss to the complainant caused by the actions of respondent, lest the contempt fine become punitive in nature, which is not appropriate in a civil contempt proceeding. " In re Tetracycline Cases, 927 F.2d 411, 413 (8th Cir.1991) (quoting NLRB v. Laborers' Int'l Union, 882 F.2d 949, 955 (5th Cir.1989)).

[8] It is clear to us that GM has suffered a compensable loss. There is no question that GM was injured as a direct result of Butler's citation to Judge Anderson's recusal order in his August 30, 1994, letter to Judge Thompson and his brief filed in Cockrum. GM has expended considerable resources to correct or thwart the effects of Butler's blatant misconduct in the Georgia state court and the United States District Court for the District of Kansas. Unquestionably, Butler's letter of August 30, 1994, caused GM to incur a considerable expense to defend actions in other jurisdictions that were premised on findings and conclusions this court had stricken and specifically ordered Butler not to cite. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses germinating from Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. Furthermore, GM is entitled to reasonable costs and attorney's fees for the contempt proceeding before this court. (FN3)

III

In summary, we find Butler in contempt of our order of March 23, 1994. As a result of Butler's contumacious behavior, GM is entitled to be compensated for its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas. We also award GM reasonable costs and attorney's fees for the contempt proceeding before this court. From the date of this order, GM has twenty days to submit a summary of its expenses related to correcting the effects of Butler's misconduct in the Georgia state court and the United States District Court for the District of Kansas and its costs and attorney's fees for this proceeding. Butler will have ten days to respond. (FN4) It is so ordered. (FN5)

FN1. Butler also discussed Judge Anderson's findings in a brief filed on April 1, 1994, with the United States District Court for the District of Kansas in Cockrum v. General Motors Corp., No. 93-1180-MLB (D. Kan.). In particular, Butler stated that "The Fourth Circuit [in its order of March 23, 1994] did not dispute or otherwise disagree with Judge Anderson's findings ... in his recusal order" and that Judge Anderson had found "a substantial likelihood that perhaps perjury and the systematic destruction of documents occurred." Plaintiffs' Brief in Opposition to Defendant General Motors Corporation's Motion for Protective Order at 14. In this brief, Butler never stated that Judge Anderson's findings were stricken and were not to be cited as authority; rather, Butler stated that this court in its order did not consider the evidence of perjury or destruction of documents but "simply ruled that such findings had no place within the confines of a recusal order." Id.

FN2. The parties in Cameron settled the case in December 1994. See Order of Dismissal, Cameron v. General Motors

Corp., Nos. 3:93-1278-07, 1279-07, 1280-07 (D.S.C. Dec. 30, 1994).

FN3. We find no merit to Butler's contention that this court lacks the authority to find him in civil contempt because the Cameron case has been settled. The nature of the contempt proceeding before the court is compensatory in nature, and unlike contempt proceedings that are coercive in nature, "the termination of the underlying action out of which the contempt hearing arose does not moot the contempt proceeding." Petroleos Mexicanos v. Crawford Enterprises, Inc., 826 F.2d 392, 400 (5th Cir.1987). This critical distinction between coercive civil contempt proceedings and compensatory civil contempt proceedings "rests upon the fact that the harm or injury that gives rise to the need for compensation continues unredressed at the end of the underlying litigation while the need for getting a party to act in the underlying litigation necessarily terminates when that litigation ends." Id. Without question, the harm suffered by GM--expending considerable resources in other jurisdictions to curb the effect of Butler's blatant misconduct--was unredressed at the time the Cameron case was settled, and, therefore, this contempt proceeding is not moot.

FN4. On June 22, 1995, eight months after Butler's show cause hearing, GM moved this court for "additional relief" relating to the contempt proceedings. In response to GM's motion, Butler filed a motion on June 30, 1995, requesting this court to dismiss the pending contempt proceedings. The court denies these motions.

FN5. If Butler has learned one thing from this proceeding, we hope it is this: the portions of Judge Anderson's recusal order which we struck in our order of March 23, 1994, are not to be cited as authority. We hope Butler will heed this admonition.

394 F.2d 240

Emerson D. FOLK and National Business Forms, Inc.,
Appellants,

v.

WALLACE BUSINESS FORMS, INC.,
Successor to Standard Business Forms, Inc.,
Appellee.

Emerson D. FOLK and National Business Forms, Inc.,
Appellees,

v.

WALLACE BUSINESS FORMS, INC.,
Successor to Standard Business Forms, Inc.,
Appellant.

Nos. 11994, 11995.
United States Court of Appeals Fourth Circuit.
Argued March 8, 1968.
Decided April 16, 1968.

Motion for contempt citation against former stockholder of plaintiff corporation and stockholder's corporation for violation of consent injunction which forbade former stockholder or his corporation from employing former employees of plaintiff corporation. The United States District Court for the Western District of North Carolina, at Charlotte, Wilson Warlick, Chief Judge, rendered judgment that the former stockholder and his corporation were in contempt and they appealed. The Court of Appeals, MacKenzie, District Judge, held that evidence that former stockholder and his new corporation made loans of money

and credit to employees of plaintiff corporation for purpose of organizing competitive corporation and that former stockholder subsequently acquired controlling interest in competitive corporation supported trial court's finding that former stockholder and his corporation violated consent injunction against employing, by direct or indirect means, employees of plaintiff corporation.

Affirmed.

1. INJUNCTION K 230(3)
212 ----
212VII Violation and Punishment
212k230 Proceedings
212k230(3) Evidence.

C.A.N.C. 1968.

Evidence that former stockholder and his new corporation made loans of money and credit to employees of plaintiff corporation for purpose of organizing competitive corporation and that former stockholder subsequently acquired controlling interest in competitive corporation supported trial court's finding that former stockholder and his corporation violated consent injunction against employing, by direct or indirect means, employees of plaintiff corporation.

2. CONTEMPT K 74
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k74 In general.

C.A.N.C. 1968.

United States District Court has right to award civil contempt damages.

3. CONTEMPT K 68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.
C.A.N.C. 1968.
Attorneys fees may be awarded as element of award in civil contempt action.

4. CONTEMPT K 75
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k75 Amount of fine.
C.A.N.C. 1968.
Amount of civil contempt damages is within discretion of trial judge.

5. CONTEMPT K 68
93 ----
93II Power to Punish, and Proceedings Therefor
93k68 Costs and fees.
[See headnote text below]

5. CONTEMPT K 75
93 ----
93III Punishment
93k73 Indemnity to Party Injured
93k75 Amount of fine.
C.A.N.C. 1968.
Trial judge did not abuse its discretion in civil contempt action by award of damages in the amount of $30,000 and attorneys' fees of $6,000.

William M. Pate, Atlanta, Ga. (Mitchell, Clarke, Pate & Anderson, Atlanta, Ga., Thomas Ashe Lockhart, and Cansler & Lockhart, Charlotte, N.C., on brief), for appellants in No. 11,994 and appellees in No. 11,995.

Fred B. Helms, Charlotte, N.C., and Henry M. Whitesides, Gastonia, N.C. (Helms, Mulliss, McMillan & Johnston, Charlotte, N.C., on brief), for appellee in No. 11,994 and appellant in No. 11,995.

Before BRYAN and CRAVEN, Circuit Judges, and MacKENZIE, District judge.

MacKENZIE, District Judge.

On October 21, 1957, Standard Business Forms, Inc. purchased Emerson D. Folk's interest in that corporation. As part of the consideration for the sale, the usual agreements were executed under which Mr. Folk agreed not to compete in a three state area and not to hire employees of Standard Business Forms, Inc. for a ten year period.

In 1959, a declaratory judgment suit was instituted by Folk and his new company, National Business Forms, Inc. to clarify the contract provisions relative to Folk's not hiring Standard's employees. On August 12, 1959, a consent permanent injunction was entered as follows:

> Now, therefore, it is ordered, adjudged and decreed as follows: 1. That the individual plaintiff, Emerson D. Folk, his heirs, executors, administrators, legal representatives, successors and assigns and the corporate plaintiff, National Business Forms, Inc., its officers, agents, servants, employees, attorneys, successors or assigns and all other persons in active concert or participation with them or either of them be and they are hereby permanently enjoined, inhibited and restrained from, directly or indirectly through any other person, firm or corporation or in any manner, until after December 31, 1967: Attempting to hire, hiring, employing or continuing to employ,

without the prior written approval of W. E. Hendricks, any person except Charles B. Brown, as set forth in the agreement of October 21, 1957, who was or has been at any time from October 21, 1954, to October 21, 1957, employed by Standard Business forms, Inc., a corporation with principal offices in Gastonia, North Carolina. 2. It is further ordered that the defendant and its surety be and they are hereby discharged from any bond heretofore posted in this proceeding, and that the plaintiffs be taxed with the costs hereof.

This 12th day of August, 1959.

(s) Wilson Warlick Wilson Warlick District Judge'.

Five years later, on October 14, 1964, Standard Business Forms, Inc., under its new merged title of Wallace Business Forms, Inc., moved for a contempt citation against Emerson D. Folk and his corporation, National Business Forms, Inc., for violating the permanent injunction set forth in the paragraph just above. In brief, the citation charged that Folk and National Business Forms, Inc., either collectively or separately, '* * * employed or caused to be employed in violation of said consent judgment and consent permanent injunction Clyde Walker, Witzel K. Chastain and J. B. Hodgins, all three of whom were employed by (Standard Business Forms, Inc.) at some time during the period between October 21, 1954 and October 21, 1957'.

After extensive hearings over a period of three years, on June 16, 1967, Chief Judge Wilson Warlick of the District Court for the Western District of North Carolina found that the injunction had indeed been violated and supplemented that finding by an order filed August 28, 1967, finding civil contempt damages against Folk and National Business

Forms, Inc., in favor of Wallace Business Forms, Inc. (formerly Standard Business Forms, Inc.) in the amount of $30,000.00 plus the costs arising from the prosecution of the contempt, and attorneys' fees of $6,000.00.

From the contempt order this appeal was taken by Folk and National Business Forms, Inc.

From that portion of the order fixing damages and attorneys' fees, a cross-appeal was taken by Wallace Business Forms, Inc. (formerly Standard Business Forms, Inc.).

The questions for decision on appeal are:

(1) Whether the finding of the trial court that Folk and National Violated the injunction by employing Witzel K. Chastain, Clyde Walker and J. B. Hodgins, is supported by the evidence;

(2) Whether the evidence supports the trial court's finding of injury to Standard or Wallace proximately resulting from the violation of the injunction found by the court;

(3) Whether the evidence authorizes a finding of damages in the amount of $30,000;

(4) Whether the award of attorneys' fees was proper.

We find ample evidence to support the findings of the District Court that Folk and National Business Forms, Inc. violated the injunction; that the damages as found by him proximately flowed from the violation and that the award of attorneys' fees was proper.

[1] It is admitted that Chastain, Walker and Hodgins were employees of Standard Business Forms, Inc. during the

period October 21, 1954 to October 21, 1957, and therefore covered by the permanent consent injunction of August 12, 1959, as being persons whose hiring was forbidden to Emerson D. Folk, National Business Forms, and all persons or corporations participating with Folk and National directly or indirectly.

Chastain, Walker and Hodgins left Standard and became employees of Eastern Business Forms, Inc., a corporation discussed by them as early as the fall of 1963, while they were still employed at Standard, and finally incorporated in September, 1964.

As early as February, 1964, while Chastain, Walker and Hodgins were still employed with Standard, Folk and National Business Forms were already aiding and abetting the three in creating Eastern Business Forms, Inc. It was then that Folk and National committed themselves for $35,000.00 for a press for Chastain, Walker and Hodgins, and this at a time when the personal credit of the three Standard employees could not possibly have warranted it. Incidentally, Chastain, a $12,000.00 a year employee of Standard, could make a $3,500.00 down payment in cash to Folk for the press equipment because Chastain 'had this money left over from some bonds he had sold in the fall of 1963 to take care of his daughter's wedding and had been carrying around in cash ever since.' Note that the down payment was made to Folk who ordered the press, in National's name, from the manufacturer.

Six months later, in August, 1964, one month before the Eastern Business Forms, Inc. began business, and two or three weeks after Chastain had left Standard, Folk loaned Chastain $40,000.00, without any security, on a note written in pencil on a piece of scrap paper. According to Chastain, he did not tell Folk what the money was for, nor did Folk ask him. Folk could not remember whether he knew of Chastain's new business venture or not. Chastain, at the time, was out of work and his $9,000.00 home had a

$10,000.00 mortgage to Folk already on it. At this point, Folk and National were underwriting Chastain, Walker, Hodgins and Eastern for $89,000.00 consisting of guaranteeing the payment of a press ($35,000.00), a rubber plate machine ($4,000.00), an unrecorded mortgage on Chastain's home ($10,000.00), and an unsecured loan to Chastain ($40,000.00).

At the time of the hiring by Eastern of Chastain, Walker and Hodgins, Folk had provided $50,000.00 (through 'loans' to Chastain) of the total subscribed capital of Eastern of $85,000.00. In addition, through his corporate credit guarantee, he had made possible the press, the one major item, and the rubber plate machine, the second of the absolute requirements for Eastern to begin operations.

The trial court was justified in finding such financing indicated a greater interest by Folk and National in Chastain, Walker, Hodgins and Eastern Business Forms, Inc. than just kindnesses extended to an old friend. Indeed, so Folk considered it, when, according to the record, he said:

> 'Q. Well, you seemed to know who had the controlling interest.
>
> A. Sure, I found out after this trial began. I would have been foolish not to learn the whole set up. At no time could the money I had in there get controlling interest of that stock'.

It is not necessary to discuss these 'loans' from Folk in any great detail as there is ample evidence to support the District Court's finding of multiple subterfuge. Suffice it to say, Folk's $10,000.00 mortgage on Chastain's $9,000.00 home was most informal. As Folk stated it, '* * * I made a little memorandum out and he and his wife signed it, but it wasn't-- I don't even know whether it was-- I suppose it was legal, but I didn't take the trouble to put it in legal terms and

take it to the courthouse and record it, because I had trust in him'.

The $40,000.00 'loan' from Folk to Chastain in August of 1964 was even less formal. It consisted of a pencil written note; Chastain did not remember whether he informed Folk what it was to be used for; and no collateral was offered. This $40,000.00 'loan' drifted in this fashion until there suddenly appeared a most comprehensive and technical security agreement drawn by Folk's attorney, executed October 24, 1964, posting Chastain's Eastern Business Forms, Inc. stock as security. It seems more than just coincidental that this security agreement was quickly produced in the short interim between the notice of October 13, 1964, to question Chastain, Walker and Hodgins and the schedule for those depositions on October 28, 1964.

Through these 'loans' and other devices, Folk and National did, in fact, provide Eastern as the employment vehicle which hired Standard employees Chastain, Walker and Hodgins. Through this camouflage they violated the injunction by acting in concert with others. The injunction specifically forbade any such 'indirect' action.

Folk and National attorneys focus their entire attack on the term 'employee' and its meaning as related to Chastain, Walker and Hodgins. In view of our finding that Folk and National violated the injunction through their indirect manipulations with Eastern Business Forms, Inc., it is not necessary to worry with this 'employee' semantics.

[2] [3] No one seriously questions the right of the Court to award civil contempt damages which have long been recognized. Parker v. United States, 153 F.2d 66, 163 A.L.R. 379 (1st Cir. 1946); Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed. 797 (1910); United States v. United Mine Workers, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947); Weston v. John L. Roper Lumber Co., 158 N.C. 270, 73 S.E. 799 (1912). So also as to the right to include attorneys' fees as an element of the award

Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 43 S.Ct. 458, 67 L.Ed. 719 (1922); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967).

[4] [5] The question of the amount of civil contempt damages of $30,000.00 and attorneys' fees of $6,000.00 was clearly within the discretion of the Trial Judge who heard all of the testimony and we are not persuaded that his finding was erroneous.

Accordingly, the finding of the District Court is affirmed.

Affirmed.

105 F.3d 933
37 Collier Bankr.Cas.2d 654, Bankr. L. Rep. P 77,293

In re Shirley Mae TOMLIN,
Debtor.
COLONIAL AUTO CENTER,
Plaintiff-Appellee,

v.

Shirley Mae TOMLIN,
Defendant-Appellant.

No. 95-2509.
United States Court of Appeals,
Fourth Circuit.
Argued Dec. 4, 1996
Decided Feb. 3, 1997.

Creditor moved for determination of dischargeability of debts in existence at time debtor's prior Chapter 7 case was dismissed "with prejudice." The United States Bankruptcy Court for the Western District of Virginia, William E. Anderson, J., denied creditor's motion for summary judgment, and appeal was taken. The District Court, James H. Michael, Jr., Senior District Judge, 184 B.R. 720, vacated and remanded. On further appeal, the Court of Appeals, Diana Gribbon Motz, Circuit Judge, held that bankruptcy court's interpretation of "with prejudice" language of its order dismissing debtor's prior Chapter 7 case, as not forever barring debtor from obtaining discharge of debts existing at time dismissal order was entered, but as serving merely to impose moratorium on debtor's ability to refile for bankruptcy relief, was not unreasonable and would be accepted on appeal.

Order of District Court reversed; case remanded.

1. BANKRUPTCY K 3782
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 Conclusions of law; de novo review.
C.A.4 (Va.) 1997.

Ambiguous or unambiguous nature of "with prejudice" language of bankruptcy court order dismissing debtor's prior Chapter 7 case was question of law, which Court of Appeals considered de novo on appeal in subsequent bankruptcy case.

2. BANKRUPTCY K 2235
51 ----
51III The Case
51III(B) Debtors
51k2235 Simultaneous or successive proceedings.

[See headnote text below]

2. BANKRUPTCY K 2264(3)
51 ----
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.
C.A.4 (Va.) 1997.

"With prejudice" language of bankruptcy court order dismissing debtor's prior Chapter 7 case did not clearly and unambiguously preclude debtor from discharging debts in existence at time dismissal order was entered, but could also be interpreted merely as imposing moratorium on debtor's ability to refile for bankruptcy relief, where dismissal order was not unqualified dismissal order but required dismissal

only for reasons set forth in trustee's motion, and where grounds alleged by trustee in support of dismissal order, including debtor's failure to attend hearing, would not support severe sanction of precluding future discharge of then-existing debts. Bankr.Code, 11 U.S.C.A. § 349(a).

3. JUDGMENT K 570(1)

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k570 Judgment on Discontinuance, Dismissal, or Nonsuit

228k570(1) In general.

C.A.4 (Va.) 1997.

Generally, dismissal of action with prejudice is complete adjudication of issues presented by pleadings and is bar to any further action between parties.

4. JUDGMENT K 542

228 ----

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k541 Courts or Other Tribunals Rendering Judgment

228k542 In general.

C.A.4 (Va.) 1997.

Principles of res judicata apply to decisions of bankruptcy court.

5. BANKRUPTCY K 2235

51 ----

51III The Case

51III(B) Debtors

51k2235 Simultaneous or successive proceedings.

[See headnote text below]

5. BANKRUPTCY K 2264(3)
51 ----
51III The Case
51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.

C.A.4 (Va.) 1997.

While bankruptcy court, in dismissing case, has authority to forever bar any discharge of debts existing at time of dismissal order, bankruptcy courts rarely use their authority to bar discharge of debts in later cases. Bankr.Code, 11 U.S.C.A. § 349(a).

6. FEDERAL CIVIL PROCEDURE K 2820
170A ----
170AXX Sanctions
170AXX(D) Type and Amount
170Ak2820 Non-monetary sanctions.

C.A.4 (Va.) 1997.

In any court, dismissal order that bars subsequent litigation is severe sanction warranted only by egregious misconduct.

7. BANKRUPTCY K 2235
51 ----
51III The Case
51III(B) Debtors
51k2235 Simultaneous or successive proceedings.
[See headnote text below]

7. BANKRUPTCY K 2264(3)
51 ----
51III The Case

51III(C) Voluntary Cases
51k2259 Dismissal
51k2264 Proceedings; Motion or Sua Sponte Action
51k2264(3) Order; prejudice.

[See headnote text below]

7. BANKRUPTCY K 3341
51 ----
51X Discharge
51X(C) Debts and Liabilities Discharged
51X(C)1 In General
51k3341 In general.
C.A.4 (Va.) 1997.

Generally, it is only if debtor engages in egregious behavior that both demonstrates debtor's bad faith and prejudices creditors that bankruptcy court will forever bar debtor from seeking to discharge his or her then existing debts. Bankr.Code, 11 U.S.C.A. § 349(a).

8. BANKRUPTCY K 3779
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 Scope of review in general.
C.A.4 (Va.) 1997.

When bankruptcy court order is ambiguous, appellate court must construe its meaning, and in so doing, may resort to record upon which order was based.

9. BANKRUPTCY K 3779
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 Scope of review in general.
C.A.4 (Va.) 1997.

Court of Appeals would give substantial deference to bankruptcy court's analysis of its own order dismissing prior Chapter 7 case, for purposes of deciding whether "with prejudice" language in prior dismissal order precluded debtor from obtaining discharge of any debts existing at that time, as bankruptcy court was best qualified to determine why it had dismissed proceeding. Bankr.Code, 11 U.S.C.A. § 349(a).

10. BANKRUPTCY K 3789.1
51 ----
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3789 Determination and Disposition; Additional Findings
51k3789.1 In general.
C.A.4 (Va.) 1997.

Bankruptcy court's interpretation of "with prejudice" language of its order dismissing debtor's prior Chapter 7 case, as not forever barring debtor from obtaining discharge of debts existing at time dismissal order was entered, but as serving merely to impose moratorium on debtor's ability to refile for bankruptcy relief, was not unreasonable and would be accepted on appeal in subsequent bankruptcy case, for purposes of deciding whether debtor was barred by res judicata from obtaining discharge of debts existing at time her earlier bankruptcy case was dismissed; bankruptcy court's interpretation of its order was in keeping with grounds set forth by trustee in moving for dismissal, which did not include any egregious misconduct by debtor of kind

which might warrant perpetual denial of discharge, but consisted of debtor's failure to attend creditors' meeting and failure to file schedules. Bankr.Code, 11 U.S.C.A. §§ 109(g), 349(a).

ARGUED: Mark Bennett Peterson, Ogle & Peterson, Charlottesville, VA, for Defendant-Appellant. Steven Shareff, Palmyra, Virginia, for Plaintiff-Appellee. ON BRIEF: Gail S. Ogle, Ogle & Peterson, Charlottesville, VA, for Defendant-Appellant.

Before ERVIN, WILKINS, and MOTZ, Circuit Judges.

Reversed and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge ERVIN and Judge WILKINS joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

In this case a creditor asserts that an order dismissing "with prejudice" a bankrupt debtor's Chapter 7 petition precluded the debtor from subsequently seeking to discharge debts existing at the time of that order. Although a bankruptcy court certainly has the power to bar a debtor from further litigating the dischargeability of pending debts, the order at issue here is ambiguous. For this reason, we defer to the bankruptcy court's interpretation of its own order as one limiting subsequent filings, not forever prohibiting the right to seek a discharge of existing debt, and reverse the district court's contrary holding.

I.

On December 27, 1991, Shirley Mae Tomlin and her husband signed a retail installment contract with Colonial Auto Center, Inc. ("Colonial") to purchase a pickup truck. Eight months later, Colonial repossessed the truck, then sold it at public auction. The sale left a deficiency of $5,284.63. On May 28, 1993, Colonial obtained a state court judgment against Tomlin for the amount of the deficiency plus interest and court costs. Subsequently, Colonial obtained another judgment against Tomlin for $1,500.00 plus interest, arising from her failure to pay a deposit owing to Colonial. The balance remaining on these two judgments constitute the debt at issue in this case.

This is the sixth bankruptcy petition Tomlin has filed in the past seven years. On May 25, 1990, Tomlin and her husband filed a petition pursuant to Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301-1330 (1994). On August 20, 1990, the bankruptcy court confirmed the Tomlins' Chapter 13 plan (an amended plan was confirmed on November 14, 1990). On January 17, 1991, Union Planters National Bank ("Union Planters") moved for relief from the stay imposed pursuant to Chapter 13. On May 3, 1991, the bankruptcy court ordered the stay lifted. On July 15, 1991, the bankruptcy court granted the Tomlins' voluntary motion to dismiss.

On July 25, 1991, Tomlin individually filed a second Chapter 13 petition. She did not submit a confirmable plan and on September 12, 1991, Union Planters moved for relief from the stay. On December 6, 1991, the bankruptcy court granted Tomlin's motion to dismiss the petition.

On April 24, 1992, Tomlin, again with her husband, filed still another Chapter 13 petition. During the pendency of this petition, the Tomlins neither attended creditors' meetings nor timely filed bankruptcy schedules. On June 22, 1992, the bankruptcy court heard the trustee's motion to

dismiss and ordered the Tomlins to cure all defaults by June 26, 1992. The Tomlins failed to abide by that order. On July 6, 1992, the bankruptcy court ordered the petition dismissed.

On September 18, 1992, Tomlin filed a pro se Chapter 7 petition to stop the foreclosure sale of her residence. *11 U.S.C. §§ 701-728* (1994). During the pendency of this petition, Tomlin did not pay the filing fee, did not attend the creditors' meeting, and did not file schedules. On November 13, 1992, the bankruptcy court dismissed the petition.

On December 17, 1992, Tomlin filed another pro se Chapter 7 petition again to stop the foreclosure sale of her residence. The next day, after Union Planters filed an emergency motion for relief from the stay, the bankruptcy court lifted the stay in an order in which it noted that it appeared that Tomlin had filed the petition in violation of *11 U.S.C. § 109(g)* (1994). A month later, on January 21, 1993, the trustee filed a motion to dismiss Tomlin's petition "with prejudice" because she had caused unreasonable delay that was prejudicial to her creditors by failing to: appear at an initial creditors' meeting, timely file her schedules, or prosecute the bankruptcy case she had filed two months before. Tomlin did not respond in any way to the trustee's motion. After a hearing, which Tomlin did not attend, on February 11, 1993, the bankruptcy court issued a dismissal order, stating only that "[f]or the reasons set forth" in the trustee's motion, Tomlin's petition would be dismissed "with prejudice."

Twenty months later, on October 14, 1994, Tomlin filed another Chapter 7 petition; this time she was represented by counsel. On November 15, 1994, the bankruptcy court entered an order discharging Tomlin's debts.

Prior to that discharge order, Colonial filed the instant action to determine the dischargeability of debts pending as of the February 11, 1993 order dismissing "with

prejudice" Tomlin's December 17, 1992 Chapter 7 petition. Colonial moved for summary judgment, asserting that the February 11 order barred Tomlin from subsequently seeking to discharge debts existing at that time.

After a hearing, the bankruptcy court issued an order and a memorandum opinion denying Colonial's motion for summary judgment. The bankruptcy court reasoned:

> The [February 11, 1993] dismissal order, although ambiguously designated simply "with prejudice," was intended only to invoke the sanction set forth in the first paragraph of § 109(g)--that the debtor be barred from filing another petition for 180 days. The matters addressed in the trustee's motion do not warrant imposition of the far more serious sanction of making all pending debts nondischargeable. The trustee did not request such a severe sanction in either the motion or at the hearing. And because the debtor did not appear at the hearing, the order dismissing the case was in effect by default.
>
> (footnotes omitted).

Colonial appealed to the district court, which reversed. Colonial Auto Center, Inc. v. Tomlin, 184 B.R. 720 (W.D.Va.1995). The district court recognized that, if there were "any ambiguity or obscurity" in an order, reference could properly be made to the "findings and entire record for determining what was decided." *Id. at 727* (quoting *Security Mut. Cas. Co. v. Century Cas. Co., 621 F.2d 1062, 1066 (10th Cir.1980)*). However, the district court found no "ambiguity or obscurity" in the bankruptcy court's order and so held the order had the "res judicata effect

of precluding the discharge of debts in subsequent bankruptcy petitions." Id. Tomlin appeals.

II.

[1]The first question presented here is a deceptively simple one: is the bankruptcy court's February 11, 1993 order ambiguous. Our review of this legal question is de novo.

[2]Colonial asserts that "dismissed with prejudice" can have "only one reasonable interpretation," namely, the final dismissal of all claims that were, or could have been, brought in the action. Brief for Appellee at 8. Thus, Colonial claims that the February 11, 1993 order "dismissing Tomlin's prior Chapter 7 case 'with prejudice' had the res judicata effect of precluding the subsequent discharge of her debts existing at the filing of the dismissed case." Id. at 6.

[3] [4]As Colonial points out, generally "dismissal of an action with prejudice is a complete adjudication of the issues presented by the pleadings and is a bar to a further action between the parties." *Harrison v. Edison Bros. Apparel Stores, Inc., 924 F.2d 530, 534 (4th Cir.1991)* (quoting *Schwarz v. Folloder, 767 F.2d 125, 129 (5th Cir.1985)*). Moreover, principles of res judicata certainly apply to decisions of bankruptcy courts. See Katchen v. Landy, 382 U.S. 323, 334, 86 S.Ct. 467, 475, 15 L.Ed.2d 391 (1966). Indeed, although the Bankruptcy Code establishes a general rule that dismissal of a case is without prejudice, it also expressly grants a bankruptcy court the authority to "bar the discharge, in a later case ... of debts that were dischargeable in the case dismissed...." *11 U.S.C. § 349(a)* (1994); 3 Collier on Bankruptcy § 349.02[2] (15th ed. rev. 1994).

[5] [6]However, a bankruptcy court rarely uses its authority to bar the discharge of debts in a later case. See *In re Robinson, 198 B.R. 1017, 1023 n. 7 (Bankr.N.D.Ga.1996).*

In any court, a dismissal order that bars subsequent litigation is a severe sanction warranted only by egregious misconduct. See *Durham v. Florida E. Coast Ry. Co., 385 F.2d 366, 368 (5th Cir.1967)* (citing *Link v. Wabash R.R. Co., 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)*). Given that the Bankruptcy Code's "central purpose" is remedial, i.e., to afford insolvent debtors an opportunity to "enjoy 'a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,' " *Grogan v. Garner, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991)* (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934)), such an order is particularly devastating in a bankruptcy case. For this reason, a permanent bar to discharge is at times referred to as the "capital punishment of bankruptcy," for it "removes much of the benefit" of the bankruptcy system. *In re Merrill, 192 B.R. 245, 253 (Bankr.D.Colo.1995).*

[7]This "drastic sanction which may affect substantial rights of the litigant" is usually limited to "extreme situations." *In re Martin-Trigona, 35 B.R. 596, 601 (Bankr.S.D.N.Y.1983)* (citing *Flaksa v. Little River Marine Constr. Co., 389 F.2d 885, 887 (5th Cir.1968)*). Generally, only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors--for example, concealing information from the court, violating injunctions, or filing unauthorized petitions--will a bankruptcy court forever bar the debtor from seeking to discharge then existing debts. See, e.g., In re Moses, 171 B.R. 789, 793-94 (Bankr.E.D.Mich.1994); Martin-Trigona, 35 B.R. at 601-02; In re Jerry's Blue Room, 19 B.R. 963, 964 (Bankr.E.D.Pa.1982).

Far more frequently, if a bankruptcy court disciplines a debtor, it will do so with a different sanction, one that is less drastic, but which is nonetheless often referred to as a dismissal with prejudice. This is a

dismissal triggering *11 U.S.C. § 109(g) (1994)*, which temporarily bans the debtor from filing further petitions. (FN1) Section 109(g) provides:

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or
>
> (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

This statute was added to the Bankruptcy Code in 1984 to address the precise abuse of the bankruptcy system at issue here--the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code's automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest. See, e.g., 1 William L. Norton, Jr., Norton Bankruptcy Law and Practice § 18:14 at 18-55-56 (2nd ed. 1994); Jeffrey W. Morris, "Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984," *27 Wm. & Mary L.Rev. 91, 101 (1985)*; *In re Faulkner, 187 B.R. 1019, 1022 (Bankr.S.D.Ga.1995)*.

Thus, the Bankruptcy Code provides a bankruptcy court with authority both to bar subsequent discharge of existing debt and to bar successive petitions under § 109(g). Although the two sanctions differ dramatically in purpose and effect, bankruptcy courts often refer to both sanctions as dismissals "with prejudice."

Even prior to the addition of § 109(g) to the Bankruptcy Code in 1984, bankruptcy courts would order a debtor to cease filing successive petitions and refer to such an order as a "dismissal with prejudice." See, e.g., *In re Damien, 35 B.R. 685, 687 (Bankr.S.D.Fla.1983)* (concluding that "every court that has considered the question has concluded that the Bankruptcy Court has discretion to dismiss with prejudice to refiling") (citing In re Sando, 30 B.R. 474, 476-77 (E.D.Pa.1983)); In re Petro, 18 B.R. 566, 567 (Bankr.E.D.Pa.1982) (finding debtors in contempt for filing an action within a year of the issuance of an order dismissing "with prejudice" their previous action).

The language of the 1984 amendments to the Bankruptcy Code apparently has increased the prevalence of this practice. In addition to the adoption of § 109(g), codifying the court's power to temporarily bar refiling, the 1984 amendments also revised the language of § 349, adding the emphasized language:

> Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.
>
> 11 U.S.C. § 349(a) (emphasis added).

Indeed, this new language has prompted some speculation that Congress intended to eliminate a bankruptcy court's power to bar permanently the discharge of existing debt. See, e.g., Dennis Montali, "Important Bankruptcy Code Changes in the Bankruptcy Amendments and Federal Judgeship Act of 1984," 332 PLI/Comm 61, 68 (1984) (New § 349(a) states that disqualification under § 109[g] constitutes a dismissal of the case with prejudice. Unfortunately, the amendment to § 349(a) can be read to exclude from the "dismissal with prejudice" label any other dismissal of a bankruptcy case since it now reads: " ' * * * nor does the dismissal of a case * * * prejudice the debtor with regard to the filing of a subsequent petition, except as provided in section 109[g] * * *.' "); Michael T. Andrew, "Real Property Transactions and the 1984 Bankruptcy Code Amendments," 20 Real Prop. Prob. & Tr. J. 47, 72 n. 107 ("It might be thought that the [language of § 349(a)] limits the prejudicial impact of a dismissal to that provided in new § 109[g]....").

Our analysis of the plain language and "statutory scheme" of the statute, Maurice Sporting Goods, Inc. v. Maxway Corp. (In re Maxway Corp.), 27 F.3d 980, 982-83 (4th Cir.1994) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-41, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989)), leads us to conclude that § 349 was never intended to limit the bankruptcy court's ability to impose a permanent bar to discharge that would have res judicata effect. Rather, the language of § 349, as amended, "seems to make clear that the court has the power to order" such a sanction "in circumstances other than those dealt with by new § 109[g]." Andrew at 72 n. 107.

But what is equally clear is that it has become common bankruptcy practice to employ the phrase "dismissed with prejudice" to refer to a temporary bar to filing another petition. As the court observed in In re Robinson, 198 B.R. 1017 (Bankr.N.D.Ga.1996):

> The usual remedy for a bad faith filing is a dismissal pursuant to § 109(g), which works to prohibit the filing by a debtor of any case under Title 11 for a period of 180 days. 11 U.S.C. § 109(g). Such a dismissal is frequently and imprecisely referred to (only by bankruptcy practitioners) as a "dismissal with prejudice."

Id. at 1022 (emphasis added); see also 2 Norton § 33:19 at 33-23 ("Although under Code § 349(a), a case may be dismissed without prejudice, where the court finds cause, the case may be dismissed with prejudice to refiling further petitions.").

Representative of the many cases in which a § 109(g) bar to refiling has been characterized as a dismissal "with prejudice" are several cases from courts in this circuit. See, e.g., Jolly v. Great W. Bank (In re Jolly), 143 B.R. 383, 385 (E.D.Va.1992) ("Debtors argue that the bankruptcy court misapplied [Code provisions] in dismissing Debtors' case with prejudice for 180 days."), aff'd, 45 F.3d 426 (4th Cir.1994); In re Hollis, 150 B.R. 145, 147 (D.Md.1993) ("According to 11 U.S.C. § 349, dismissal of a bankruptcy petition is without prejudice, except as provided in section 109(g).") (footnote omitted); Owings v. Doniff (In re Doniff), 133 B.R. 351, 354 (Bankr.E.D.Va.1991) (ordering "dismissal with prejudice pursuant to 11 U.S.C. § 349" and enjoining the debtor "from filing a bankruptcy petition for a period of 180 days after dismissal").

There are also numerous similar cases from other jurisdictions. See, e.g., In re Jones, 192 B.R. 289, 291 (Bankr.M.D.Ga.1996) ("It is clear that the drafters of the Bankruptcy Code and Bankruptcy Regulations knew how to provide for a dismissal with prejudice. See 11 U.S.C.A. §§ 109(g) and...."); In re Armwood, 175 B.R. 779, 787

(Bankr.N.D.Ga.1994) ("The usual remedy for a bad faith filing is dismissal 'with prejudice,' which works to prohibit the filing by a debtor of any case under Title 11 for a period of 180 days."); In re Gros, 173 B.R. 774, 777 (Bankr.M.D.Fla.1994) (As "the debtor's multiple bankruptcy filings, coupled with involuntary dismissals [was] cause to dismiss this case with prejudice," the court barred the debtor from filing another petition for two years without court permission.); In re Standfield, 152 B.R. 528, 539-40 (Bankr.N.D.Ill.1993) ("The totality of the circumstances warrants the imposition of dismissal of this case with prejudice ... and the prohibition of the filing of another case for a period of 180 days...."); In re Jourdan, 108 B.R. 1020, 1021-22 (Bankr.N.D.Iowa 1989) (noting that "there is nothing to prevent a debtor from immediately refiling another Chapter 13 case ... so long as the previous dismissal was without prejudice...."); Lerch v. Federal Land Bank of St. Louis (In re Lerch), 94 B.R. 998, 1001 (N.D.Ill.1989) ("The clear meaning of [§ 349] is that unless the court 'for cause, orders otherwise,' the court may not dismiss a case with prejudice for a period beyond the explicit 180-day limitation found in Section 109(g)."). (FN2)

Thus, notwithstanding Colonial's assertions, in the bankruptcy context a "dismissal with prejudice" does not have "only one reasonable interpretation." Rather, the term "dismissal with prejudice" in bankruptcy cases can either permanently bar discharge of certain debts or it can trigger the bar to filing successive petitions under § 109(g).

Of course, the actual language of a given order may eliminate any ambiguity. The bankruptcy court's February 11, 1993 order provided that, "for the reasons set forth" in the trustee's motion to dismiss, the case was "dismissed with prejudice."

The order contains no specific reference to the § 109(g) bar to filing successive petitions. Cf. In re Dandy

Doughboy Donuts, Inc., 66 B.R. 457, 458 (Bankr.S.D.Fla.1986). Nor does it state the period of time that it would be in effect, e.g., the 180-day period provided in § 109(g) or a longer period. Cf. Gros, 173 B.R. at 776; In re McKissie, 103 B.R. 189 (Bankr.N.D.Ill.1989); In re Conley, 105 B.R. 116, 117 (S.D.Fla.1989). Thus the order does not contain two of the more usual provisions indicating intent to invoke the bar to successive filings under § 109(g).

However, sometimes bankruptcy courts do not include such indicia in dismissal orders but simply dismiss "with prejudice," when they nonetheless intend to bar refiling. See e.g., In re Peia, 145 B.R. 749, 750 (Bankr.D.Conn.1992); In re Hollis, 150 B.R. 145, 146 (D.Md.1993); In re Petro, 18 B.R. 566, 569 (Bankr.E.D.Pa.1982). Colonial argues that such unqualified "with prejudice" dismissals do not provide precedent for concluding that the order at issue here was ambiguous. Brief for Appellee at 17-18. It emphasizes that the opinions accompanying the orders in Peia and Hollis indicated that all that was intended in those cases was a bar on refiling while in this case there is no similar clarification in an accompanying opinion or, indeed, any accompanying opinion at all. Id.

Although we agree that these cases do not provide a direct precedent for Tomlin's position, we nonetheless find them relevant. In distinguishing them, Colonial implicitly concedes that language in an accompanying opinion can change the meaning of what Colonial asserts would otherwise be an unambiguous order barring a debtor from subsequently seeking to discharge existing debts. This concession illustrates the slipperiness of a "with prejudice" dismissal in the bankruptcy context.

Nevertheless, Colonial asserts that the dismissal "with prejudice" order in this case was totally "unqualified" and thus unambiguous. Brief for Appellee at 9. Contrary to

Colonial's assertions, the order at issue here is not a totally "unqualified" dismissal "with prejudice." Rather, the order provides that the case is dismissed "with prejudice" "for the reasons set forth" in the trustee's motion.

The trustee moved to dismiss Tomlin's Chapter 7 petition "with prejudice" only after the bankruptcy court had lifted the automatic stay in an order that specifically noted that Tomlin had apparently filed her petition "in violation of § 109(g)." Moreover, the trustee listed the following grounds in support of its motion to dismiss: (1) Tomlin's failure to appear at the initial creditors' meeting; (2) her failure to file her schedules on time, and (3) her failure to prosecute her September 18 bankruptcy case. These reasons hardly constitute examples of the egregious conduct and bad faith, which has generally been regarded as the necessary predicate to barring a debtor from forever seeking to discharge debts existing at the time of the dismissal order. Cf. Martin-Trigona, 35 B.R. at 601-02; Moses, 171 B.R. at 793-94. Rather, the usual remedy, even for far more prevalent serial filing than that presented to the bankruptcy court in this case (in moving to dismiss, the trustee only mentioned one of Tomlin's earlier filings) is the § 109(g) temporary bar to filing. See, e.g., In re Penz, 121 B.R. at 602, 604-05 (Bankr.E.D.Okla.1990); Gros, 173 B.R. at 777; Peia, 145 B.R. at 750.

Although when moving to dismiss "with prejudice" the trustee did not specifically invoke § 109(g), the bankruptcy court itself had invoked § 109(g) against Tomlin just two months before when lifting the automatic stay. Moreover, in moving to dismiss "with prejudice" the trustee asserted classic § 109(g) reasons for seeking the dismissal. Accordingly, we believe the bankruptcy court's order granting the trustee's motion to dismiss "with prejudice," for the reasons set forth" in that motion, is ambiguous. This, of course, does not mean that the order necessarily imposed a §

109(g) sanction. It may have triggered this bar or it may, as Colonial claims, have banned Tomlin from subsequently seeking the discharge of existing debt.

III.

[8] Our remaining task is to determine the meaning of the ambiguous order at issue here. When an order is ambiguous, a court "must construe its meaning, and in so doing may resort to the record upon which the judgment was based." Spearman v. J & S Farms, Inc., 755 F.Supp. 137, 140 (D.S.C.1990). See also Sec. Mut. Cas. Co., 621 F.2d at 1066 ("If there is any ambiguity or obscurity" in an order, "reference may be had to the findings and the entire record for the purpose of determining what was decided.").

The record here includes the 1995 memorandum opinion of the bankruptcy court interpreting its 1993 dismissal "with prejudice" to mean a bar to refiling under § 109(g). We have previously observed that we will defer to a district court's interpretation of its own order. See Anderson v. Stephens, 875 F.2d 76, 80 n. 8 (4th Cir.1989); Simmons v. South Carolina State Ports Auth., 694 F.2d 63, 66 (4th Cir.1982). We must now decide whether similar deference should be accorded to a bankruptcy court's interpretation of its order.

Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973 (1st Cir.1995), is instructive. There, the bankruptcy court had entered a court order confirming a reorganization plan, and subsequently interpreted it to protect the former lawyers of an insurance company. On appeal, the insurance company argued that the order did not afford their former lawyers this protection. The First Circuit rejected the insurance company's challenge, explaining:

> Even though our interpretation of the confirmation order essentially presents a question of law, the bankruptcy court in this case was interpreting its own order of confirmation. We think customary appellate deference is appropriate in these circumstances with respect to the bankruptcy court's determination that the confirmation order was sufficiently broad to confer "incidental" protection to [the lawyers].

Id. at 983 (emphasis added) (internal citation omitted).

[9] We believe that the bankruptcy court's interpretation of its own order here similarly warrants "customary appellate deference." The bankruptcy court was "in the best position to interpret its own orders." Texas N.W. Ry. Co. v. Atchison, Topeka and Santa Fe Ry. Co. (In re Chicago, Rock Island & Pac. R.R. Co.), 860 F.2d 267, 272 (7th Cir.1988). Accord Hastert v. Illinois St. Bd. of Elect. Comm'rs., 28 F.3d 1430, 1438 (7th Cir.1993). The First Circuit noted in Monarch that the bankruptcy court "was directly engaged" in the earlier proceedings and thus had the "better vantage point" to make a determination on its earlier order. Monarch, 65 F.3d at 983. Similarly, the bankruptcy court here was "directly engaged" in Tomlin's earlier case, giving it a "better vantage point" from which to assess the order's meaning. Since "[t]he court best qualified to determine why it is dismissing a proceeding is the court doing the dismissing," we will give substantial deference to the bankruptcy court's analysis on its own order to dismiss. In re Bono, 70 B.R. 339, 343 (Bankr.E.D.N.Y.1987). See also Ranch House of Orange-Brevard, Inc. v. Gluckstern (In re Ranch House of Orange-Brevard, Inc.), 773 F.2d 1166, 1168 (11th Cir.1985) (expressing reluctance to overturn a court's interpretation of its own order because "[t]he

Bankruptcy judge who has presided over a case from its inception is in the best position to clarify any apparent inconsistencies in the court's rulings.").

[10] Examination of the record demonstrates that the bankruptcy court's interpretation of its order is reasonable in light of the facts of this case. The bankruptcy court noted that the trustee's motion did "not warrant imposition of the far more serious sanction of making all pending debts nondischargeable. The trustee did not request such a severe sanction in either the motion or at the hearing." Instead, the trustee cited Tomlin's failure to attend the initial creditors' meeting and failure to file her schedules. The trustee's motion stated that Tomlin had caused unreasonable delay and had prejudiced her creditors by this behavior. No doubt Tomlin's behavior constitutes an abuse of the protection afforded her by the bankruptcy system. Her purpose seemed clear; by continuously filing petitions, the automatic stay prevented foreclosure action on her home. This is the very behavior for which Congress formulated § 109(g). 1 Norton § 18:14 at 18-58-59. The bankruptcy court's order--as interpreted by that court--was the most appropriate sanction for the abuse Tomlin committed. By prohibiting her from filing another petition immediately after the dismissal of the case, the court prevented Tomlin from committing the very behavior that triggered the sanctions in the first place. (FN3)

Nor does the fact that the order at issue here contains no finding of willfulness undermine the bankruptcy court's conclusion it was intended to trigger a § 109(g) sanction. Colonial is quite correct that "the plain language" of § 109(g) bars a subsequent filing sanction only if the bankruptcy court finds a previous case was dismissed because of a debtor's "willful failure" to abide by a court order. Brief for Appellee at 15. But that finding need not be made at the time of the earlier dismissal; it can be made when the bankruptcy court is later called upon to determine if § 109(g) bars a subsequent filing. See Montgomery v. Ryan (In re

Montgomery), 37 F.3d 413, 415 (8th Cir.1994); Robinson, 198 B.R. at 1023 n. 8; In re Faulkner, 187 B.R. 1019, 1023 (Bankr.S.D.Ga.1995); In re Pappalardo, 109 B.R. 622, 626 (Bankr.S.D.N.Y.1990). For example, in Montgomery, 37 F.3d at 414-15, the bankruptcy court's order stated only that the case was dismissed because the debtor failed to attend a creditors' meeting; there was no finding of willfulness. Within 180 days, the debtor sought to file another petition. Id. at 414. At that time, the bankruptcy court found that the prior dismissal was based on the debtor's willful failure to follow a court order and so § 109(g) barred the subsequent filing. Id. at 415. The Eighth Circuit affirmed explaining, "a finding of willfulness was necessary only when the bankruptcy court dismissed the second petition." Id. See also Faulkner, 187 B.R. at 1023 ("Since the language of section 109(g) is set out as an eligibility requirement, the determination cannot be made until the filing of the successive case.").

In the case at hand, the trustee's motion clearly indicated that Tomlin's behavior demonstrated a willful failure to prosecute her case. That the bankruptcy court made no finding of willfulness in the 1993 order is therefore not determinative. If Tomlin had filed a subsequent action within 180 days of the previously dismissed action, the court could have made that finding at that time based on a review of Tomlin's record in the earlier proceedings.

Finally, Colonial heavily relies on In re Smith, 133 B.R. 467 (Bankr.N.D.Ind.1991), as compelling the conclusion that the order at issue here must be one prohibiting Tomlin from seeking the discharge of existing debt. That reliance is misplaced. Although Smith resolves differently the same issue we have grappled with here, it is no way inconsistent with our decision. In Smith when the debtors and trustees in a Chapter 7 case failed to come to an agreement, the trustee moved the bankruptcy court to dismiss the case or to deny discharge. Judge Riegle of the

bankruptcy court granted the motion, and issued an order stating "that this case be dismissed with prejudice." Id. at 468. Eighteen months later, the debtors filed another Chapter 7 petition and the trustee again moved to dismiss, asserting the earlier dismissal "with prejudice" precluded the debtors "from ever seeking further relief" under the Bankruptcy Code. Id. A different bankruptcy judge, Judge Grant, properly rejected that argument and then interpreted Judge Riegle's order to mean a permanent bar on discharging the debts in question at the time of the previous filing: "The dismissal of a bankruptcy case with prejudice 'denies a debtor [the] future discharge of debts dischargeable in that particular case.' " Id. at 470 (quoting Frieouf v. United States (In re Frieouf), 938 F.2d 1099, 1103 (10th Cir.1991)).

Smith provides no authority for Colonial's position here because the order in Smith, unlike that here, apparently was an unadorned dismissal "with prejudice." Moreover, the Smith order was issued in response to the trustee's request to "dismiss the case or ... deny the discharge." 133 B.R. at 467. In contrast, the trustee in the instant case never requested that Tomlin be denied the right to seek to discharge her debts in the future, but instead asked that her case be dismissed on typical § 109(g) grounds. Thus, the Smith order differs from that presented here in that it apparently was an unqualified and unambiguous order preventing the debtor from subsequently seeking to discharge existing debt.

Even if the Smith order were identical to that at issue here (and there is no indication it was), our holding would still not be inconsistent with that of Smith. Our conclusion that the order before us is ambiguous does not signify that it was definitively a § 109(g) order. We deferred to the interpretation of the court that fashioned the order to resolve this ambiguity. In Smith, the court that fashioned the order never opined as to its meaning. If it had done so, a court subsequently examining the order might well have deferred to the original court's interpretation, as we have done here.

IV.

For these reasons, we reverse the order of the district court, which had reversed the bankruptcy court, and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

FN1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 352, 269 (1984), added new subsection (f) to § 109 to provide a 180-day bar to filing. This was redesignated as subsection (g) by § 253 of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub.L. 99-554, 100 Stat. 3105 (1986). Throughout this opinion, it will be referred to as § 109(g).

FN2. Of course, as the district court recognized, a bankruptcy court can impose sanctions under § 109(g) without dismissing a case "with prejudice." See Colonial Auto Center, 184 B.R. at 726. What is significant is that bankruptcy courts so frequently do characterize a dismissal intended to trigger § 109(g) as a dismissal "with prejudice." Indeed, some courts have been reluctant to impose § 109(g) sanctions if the underlying order was without prejudice. See In re Felts, 60 B.R. 736 (Bankr.W.D.Ky.1986) ("It is the opinion of the court that the present petition is not violative of 11 U.S.C. Section 109[g] since the [prior] dismissal ... expressly denoted that said dismissal was 'without prejudice.'"); 1 Norton § 18:14 at 18-57.

FN3. Of course, similar conduct has also been found to merit the imposition of a permanent bar to discharge the debts existing at the time of the dismissal. Some courts seem to have equated the "willful failure" to obey a court order necessary to trigger a § 109(g) sanction with the "bad faith" leading to a permanent bar to the discharge of the debts. See, e.g., In re McClure, 69 B.R. 282, 284-85

(Bankr.N.D.Ind.1987). However, the majority of bankruptcy courts have sought clear evidence of "bad faith" before proceeding to prohibit a debtor from ever discharging then existing debts, evidence that goes beyond mere willfulness. Jerry's Blue Room, 19 B.R. at 964 (bad faith actions merit "serious" and "rarely invoked" remedy of dismissal with prejudice); Moses, 171 B.R. at 798 (same); Martin-Trigona, 35 B.R. at 601 (same). Cf. Hall v. Vance, 887 F.2d 1041, 1045 (10th Cir.1989) (filing monthly reports and plan late does not constitute evidence of bad faith, and thus, no dismissal with prejudice can be imposed).

UNITED STATES of America,
Appellee,

v.

Anthony GUARIGLIA,
Defendant-Appellant.

No. 409, Docket 91-1372.
United States Court of Appeals,
Second Circuit.
Argued Jan. 7, 1992.
Decided April 17, 1992.

Defendant was convicted in the United States District Court for the Southern District of New York, Michael B. Mukasey, J., of criminal contempt for violating bankruptcy court order and of perjury, and he appealed. The Court of Appeals, Miner, Circuit Judge, held that: (1) District Court could in the first instance punish for criminal contempt violation of order of bankruptcy court; (2) in evaluating materiality of perjury committed at trial before petit jury, focus is properly on impact of perjury on trier of fact, not on whether investigation would or could have resulted without the perjury, and standard for testing for materiality is whether false testimony was capable of influencing fact finder in deciding issues before it; and (3) appellate court's reversal of convictions on basis that if jury had been aware of witness' perjury, jury probably would have acquitted defendants, established materiality of witness' false statements for purposes of prosecuting witness for perjury.

Affirmed.

1. BANKRUPTCY K 2134
51 ----
51II Courts; Proceedings in General
51II(A) In General
51k2134 Contempt.
C.A.2 (N.Y.) 1992.

District court could in the first instance punish for criminal contempt violation of order of bankruptcy court; bankruptcy court order restraining officer of corporate debtor from gambling was issued by bankruptcy court as "unit" of district court, and statute providing court with power to punish for disobedience of "its" order accordingly provided district court with jurisdiction to hear and determine contempt case arising from violation of bankruptcy court order. 18 U.S.C.A. § 401(3); 28 U.S.C.A. § 151.

See publication Words and Phrases for other judicial constructions and definitions.

2. PERJURY K 36
297 ----
297II Prosecution
297k35 Trial
297k36 Questions for jury.
C.A.2 (N.Y.) 1992.

Determination of materiality of defendant's allegedly perjurious statement is for trial court to determine as matter of law, rather than for jury determination. 18 U.S.C.A. § 1623.

3. PERJURY K11(2)
297 ----
297I Offenses and Responsibility Therefor
297k11 Materiality of Testimony or Assertion
297k11(2) Materiality in general.
C.A.2 (N.Y.) 1992.

In evaluating materiality of perjury committed at trial before petit jury, focus is properly on impact of perjury on trier of fact, not on whether investigation would or could have resulted without the perjury, and standard for testing for materiality is whether false testimony was capable of influencing fact finder in deciding issues before it, requiring analysis in terms of perjury's impact on ultimate verdict. 18 U.S.C.A. § 1623.

4. PERJURY K 11(2)
297 ----
297I Offenses and Responsibility Therefor
297k11 Materiality of Testimony or Assertion
297k11(2) Materiality in general.
C.A.2 (N.Y.) 1992.

Appellate court's reversal of convictions on basis that if jury had been aware of witness' perjury, jury probably would have acquitted defendants, established materiality of witness' false statements for purposes of prosecuting witness for perjury; conclusion in the prior criminal case established that false testimony was at least capable of influencing jury on issue of guilt or innocence. 18 U.S.C.A. § 1623.

Michael D. Rips, New York City (Allison Manning, Cathy W. Isaacson, David F. Bayne, Wright Manning Rips & Maloney; Lawrence G. Sager; and Howard F. Cerny, of counsel), for defendant-appellant.

Steven A. Standiford, Asst. U.S. Atty., New York City (Otto G. Obermaier, U.S. Atty. and Daniel C. Richman, Asst. U.S. Atty., of counsel), for appellee.

Before MINER, ALTIMARI and MAHONEY, Circuit Judges.

MINER, Circuit Judge:

Defendant-appellant Anthony Guariglia appeals from a judgment of conviction entered on June 3, 1991 in the United States District Court for the Southern District of New York (Mukasey, J.) after a jury found him guilty of criminal contempt, under 18 U.S.C. § 401(3), for violating a bankruptcy court order, and of perjury, under 18 U.S.C. § 1623. The charges against defendant stem from his participation in a bribery and fraud conspiracy involving the officers and directors of the Wedtech Corporation ("Wedtech"), and his subsequent cooperation with the government in the prosecution of other participants in the scheme. United States v. Wallach, 935 F.2d 445 (2d Cir.1991).

The indictment alleged that (i) defendant by his gambling activities violated a bankruptcy court order restraining defendant and other Wedtech defendants from, among other things, "gambling with any property or monies owned, controlled, or possessed by any of [them];" and (ii) defendant made perjurious statements at the trial of other Wedtech defendants by testifying that he had not gambled after the summer of 1988, when he in fact gambled in the fall of that same year. Defendant appeals his conviction, arguing, inter alia, that the district court did not have authority, under section 401, to sanction defendant for violation of the bankruptcy court order, and that the district court committed reversible error by applying the wrong legal standard for the "materiality" element of perjury. For the reasons stated below, we affirm the judgment of the district court.

BACKGROUND

This appeal is part of the tangled litigation web surrounding the now defunct Wedtech and the dubious dealings that defendant and others had with and through the corporation. The checkered history of Wedtech--a South Bronx based engineering company subsisting largely on government contracts--and the scandals leading to its demise are more fully set forth in this Court's opinion in Wallach, 935 F.2d 445.

Defendant Guariglia joined Wedtech in May 1983, and was the corporation's President and Chief Operating Officer, as well as a member of its Board of Directors. Guariglia and other Wedtech officers and directors allegedly engaged in a conspiracy to bribe government officials, commit mail fraud, and make illegal payments to labor officials. On December 26, 1986, Wedtech filed for bankruptcy. In early 1987, Wedtech filed an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York against Guariglia and three other former Wedtech officers to recover corporate money and assets that allegedly were converted to improper personal uses.

On January 26, 1987, Guariglia entered into a cooperation agreement with the government whereby he pled guilty to conspiracy to bribe government officials, conspiracy to file false statements, and conspiracy to commit mail fraud. On March 11, 1987, Wedtech obtained a preliminary injunction from the bankruptcy court restraining Guariglia from disposing of any of his assets. Pursuant to his cooperation agreement with the government, Guariglia testified as a government witness, in the spring of 1988, at the trial of Congressman Mario Biaggi, Bronx Borough President Stanley Simon, and other individuals participating in Wedtech misdealings. From this testimony, Wedtech

learned that while Guariglia was cooperating with the government, he had lost substantial sums of money as a consequence of gambling in Atlantic City, New Jersey.

On June 30, 1988, Wedtech obtained an order on stipulation from the bankruptcy court directing entry of final partial judgment against Guariglia, in the amount of $1,624,702, for sums Guariglia improperly diverted and received from Wedtech. On that same date, the bankruptcy court filed a second stipulation and order ("Order"), which provided:

> Defendants ... are restrained from transferring, converting, disposing of or gambling with any property or monies owned, controlled or possessed by any of the defendants without prior approval of either the [bankruptcy court] or Wedtech....

In the spring and summer of 1989, Guariglia extensively testified for the government as a key witness at the trial of Rusty K. London, E. Robert Wallach, and Wayne F. Chinn, who were alleged participants in the Wedtech criminal scheme. See Wallach, 935 F.2d at 455. On direct examination, Guariglia stated that he had ceased gambling after the summer of 1988. Id. On cross-examination, however, Guariglia admitted that he had signed gambling markers in September and October of 1988. Id. On redirect, Guariglia attempted to explain that although he had signed the markers, he did not gamble with the chips, claiming that he used the chips to satisfy a previously incurred debt. Id. In December 1989, four months after conviction of the Wallach defendants, the government learned from Ira Cohen, a former friend and business associate of Guariglia's, that Cohen had seen Guariglia gambling in Puerto Rico in November 1988.

Thereafter, Guariglia admitted to federal prosecutors that he had gone to Puerto Rico and signed markers at a casino, but he denied having gambled with the chips.

On June 26, 1990, Guariglia was indicted in the district court for criminal contempt of the bankruptcy court Order prohibiting him from gambling (see 18 U.S.C. § 401(3)), perjury committed at the Wallach trial (see 18 U.S.C. § 1623), and making false statements to federal prosecutors (see 18 U.S.C. § 1001). At his trial, the district judge concluded that the materiality element of perjury was for the court to decide, and determined, citing United States v. Berardi, 629 F.2d 723, 729 (2d Cir.), cert. denied, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980), that " '[m]ateriality is ... demonstrated if the question posed is such that a truthful answer could help the inquiry, or a false response hinder it, and these effects are weighed in terms of potentiality rather than probability.' " The court then found that the element was met, since "a truthful answer ... could have tended to undermine Guariglia's credibility, and thus could have helped the inquiry on which the jury was embarked...." A jury convicted Guariglia on the contempt and perjury charges, but not on the charge of making false statements to prosecutors. The jury apparently rejected Guariglia's claim that he did not gamble with the chips that he had purchased. For the reasons set forth below, we affirm the judgment of conviction entered in the district court.

DISCUSSION

I. The district court's exercise of jurisdiction

[1] The federal contempt statute, 18 U.S.C. § 401, provides:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as--
>
> * * * * * *
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Guariglia argues that, under this statute, the district court did not have the authority to sanction him for violation of the Order of the bankruptcy court. He asserts that the plain language of section 401(3)--providing the court with the power to punish for disobedience of "its" order--requires that the court sanctioning the defendant be the same court which issued the order that is the basis for the contempt. Guariglia contends that Bankruptcy Rule 9020 prescribes the contempt procedure to be followed for contempt of the bankruptcy court Order, and that this Rule requires that the issue first be submitted to the bankruptcy court for a hearing and determination, with the opportunity for de novo review in the district court. We do not agree.

Section 151, Title 28 of the United States Code, entitled "Designation of bankruptcy courts," states:

> In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district.

28 U.S.C. § 151 (emphasis added). Under this provision, "much of the autonomy has been stripped from the bankruptcy courts, now labeled 'units' of the district courts." Griffith v. Oles (In re Hipp, Inc.), 895 F.2d 1503, 1514 (5th Cir.1990). Indeed, "[t]he district court may withdraw, in whole or in part, any case or proceeding [from the bankruptcy court] ... for cause shown." 28 U.S.C. § 157(d); see also Goerg v. Parungao, 930 F.2d 1563, 1565 (11th Cir.1991) ("original jurisdiction over bankruptcy cases is vested in Article III courts and [the] bankruptcy courts [retain] jurisdiction only at the discretion of the district court") (citing 28 U.S.C. §§ 1334(a) and (b), 151, 157).

By definition, under the statutory scheme, the bankruptcy court Order restraining Guariglia from gambling was issued by a "unit" of the district court. See 28 U.S.C. § 151. As an Order originating from a unit of the district court, it necessarily follows that the Order constitutes an Order of both the bankruptcy court and the district court for the district encompassing the bankruptcy court from which the Order emanated. Thus, the district court clearly had the authority to punish for disregard of "its" authority. See 18 U.S.C. § 401(3); cf. Resyn Corp. v. United States, 945 F.2d 1279, 1284 (3d Cir.1991) (holding that since bankruptcy court is unit of district court, statute entitling successful litigant to interest on money judgment "recovered in district court" necessarily applies to bankruptcy court judgments); United States v. Klein, 910 F.2d 1533 (7th Cir.1990) (reinstating jury verdict obtained in district court finding defendant guilty of criminal contempt, under 18 U.S.C. § 401(3), for violation of bankruptcy court order). Therefore, under the plain language of section 401, the district court had

jurisdiction to hear and determine the contempt case against Guariglia for violation of the bankruptcy Order.

We note also that there is a serious question as to whether the bankruptcy court would have had the authority to punish Guariglia for criminal contempt of its Order had the government first sought a determination by the bankruptcy court. See Bankr.R. 9020, Advisory Comm. Note-1987 Amendment ("This rule, as amended, recognizes that bankruptcy judges may not have the power to punish for contempt."); see also Griffith, 895 F.2d at 1509 (bankruptcy court lacks power to punish for criminal contempt). We need not resolve this issue, however, as we now hold that a district court may, in the first instance, punish for criminal contempt a violation of an order of a bankruptcy court where the bankruptcy court is a "unit" of the district court imposing the punishment.

II. "Materiality" standard for perjury

[2] To be convicted of perjury, a defendant must have made a "false material declaration" "to any court or grand jury of the United States." 18 U.S.C. § 1623. It is firmly established that the trial court initially determines the materiality of a defendant's statement as a matter of law, United States v. Mancuso, 485 F.2d 275, 280 (2d Cir.1973) (citations omitted), before submitting the remaining factual issues to the jury. See Kungys v. United States, 485 U.S. 759, 772, 108 S.Ct. 1537, 1547, 99 L.Ed.2d 839 (1988); Sinclair v. United States, 279 U.S. 263, 298-99, 49 S.Ct. 268, 273-74, 73 L.Ed. 692 (1929); cf. United States v. Novod, 927 F.2d 726, 729 (2d Cir.), cert. denied, --- U.S. ----, 111 S.Ct. 2018, 114 L.Ed.2d 104 (1991); United States v. Demauro, 581 F.2d 50, 53 (2d Cir.1978). In light of the overwhelming weight of established authority, we decline Guariglia's invitation to hold that the materiality issue must be submitted for jury determination.

In this case, the district judge concluded that the statements in issue were material because "a truthful answer ... could have tended to undermine Guariglia's credibility, and thus could have helped the inquiry on which the jury was embarked...." (emphasis added). Guariglia asserts that the district court applied the incorrect standard for materiality. He relies on our decision in United States v. Freedman, 445 F.2d 1220 (2d Cir.1971), claiming that "in order for a knowingly false statement to be material, it must be shown that a truthful answer would have been of sufficient probative importance to the inquiry so that, as a minimum, further investigation would have occurred." Id. at 1226-27 (emphasis added).

[3] Generally, we have deemed a statement material, for purposes of evaluating perjury before a grand jury, when a "truthful answer could conceivably have aided the grand jury investigation." Mancuso, 485 F.2d at 280-81 (emphasis added). See also United States v. Moon, 718 F.2d 1210, 1237 (2d Cir.1983); United States v. Berardi, 629 F.2d 723 (2d Cir.), cert. denied, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980). This formulation derives from Carroll v. United States, 16 F.2d 951 (2d Cir.), cert. denied, 273 U.S. 763, 47 S.Ct. 477, 71 L.Ed. 880 (1927), where we stated that testimony is material if it "has a natural effect or tendency to influence, impede, or dissuade the grand jury from pursuing its investigation...." Id. at 953. In Freedman, we relied on our Carroll analysis, but phrased the standard in terms of "would have," where the false testimony was given during an SEC investigative proceeding. Our subsequent perjury cases arising in the investigatory context have not clearly delineated when the "would have," rather than "could have," test should be applied. In point of fact, those cases cast serious doubt on whether the two tests function differently as a practical matter, as we have noted that the same conclusion results in each of those cases under either formulation. See Novod, 927 F.2d at 729 n. 1; Demauro, 581 F.2d at 53 n. 1;

United States v. Doulin, 538 F.2d 466, 470 n. 3 (2d Cir.), cert. denied, 429 U.S. 895, 97 S.Ct. 256, 50 L.Ed.2d 178 (1976); Mancuso, 485 F.2d at 281 n. 17.

We need not, however, resolve the issue of the standard of materiality to be applied for false statements made in an investigative setting because this case involves perjury committed at a trial before a petit jury. In evaluating materiality in this context, the focus properly is on the impact on the trier of fact, not on whether further investigation would or could have resulted. Therefore, our prior precedents setting forth the standards to be applied in various investigative settings are of limited usefulness.

With regard to perjury committed at trial before a petit jury or a judge sitting as a factfinder, we previously have concluded that "[t]he test of materiality is whether the false testimony was capable of influencing the fact finder in deciding the issues before [it]." United States v. Fayer, 573 F.2d 741, 745 (2d Cir.), cert. denied, 439 U.S. 831, 99 S.Ct. 108, 58 L.Ed.2d 125 (1978). See also United States v. Salinas, 923 F.2d 339, 341 (5th Cir.1991); United States v. Flowers, 813 F.2d 1320, 1325-26 (4th Cir.1987); United States v. Sablosky, 810 F.2d 167, 169 (8th Cir.), cert. denied, 484 U.S. 833, 108 S.Ct. 109, 98 L.Ed.2d 68 (1987); United States v. Anderson, 798 F.2d 919, 926 (7th Cir.1986); United States v. Girdner, 773 F.2d 257, 259 (10th Cir.1985), cert. denied, 475 U.S. 1066, 106 S.Ct. 1379, 89 L.Ed.2d 605 (1986); United States v. Scivola, 766 F.2d 37, 44 (1st Cir.1985). In the trial context, this standard properly reflects the notion that the materiality of false trial testimony should be analyzed in terms of the false testimony's impact on the factfinder's ultimate verdict, and not in terms of whether the false testimony hinders further inquiry.

[4] Applying this standard, we already have determined that Guariglia's false statements were capable of influencing the Wallach tribunal on the issues before it, and therefore are material for purposes of the perjury statute. In

Wallach, we reversed the defendants' convictions because we found that "had the jury been aware of Guariglia's perjury[,] it probably would have acquitted the defendants." Wallach, 935 F.2d at 458 (emphasis added). This finding obviously satisfies the materiality standard, since such a determination necessarily means that the statements were capable of influencing the jury on the issue of guilt or innocence of the defendants in that case.

Guariglia argues that different tests are applied in deciding whether a statement is material for perjury purposes and in deciding whether perjured testimony warrants reversal of a conviction. He asserts that the Wallach holding, being a product of the latter analysis, should not be determinative when analyzing materiality in his perjury trial and does not foreclose this Court from deeming the statements not material. We reject this strained reasoning. Regardless of the legal question at issue in Wallach, our conclusion in that case makes it plain that the false testimony was at a minimum capable of influencing the jury on the issue of guilt or innocence. Therefore, based on Wallach's conclusion as to the impact of Guariglia's false testimony on that trial's outcome, we find the false trial testimony to be material.

We have considered appellant's remaining arguments and find them to be without merit.

CONCLUSION

For the reasons stated, we affirm the judgment of the district court.

52 Empl. Prac. Dec. P 39,705

Paul W. RIDENOUR; Oliver H. Perry, II;
Paula A. Geitner; Judith L. Hopper,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION; Frank J. Colson,
Chairman, Board of Directors; Lasalle Petty, Jr., Col. Vice
Chairman, Board of Directors; Leo M. Neff, Secretary and
Member Board of Directors; Woodrow W. Jenkins,
Treasurer and Member Board of Directors;
William J. Baldridge; Ronald J. Fitzgerald; Frederick
Szwed, Members, Board of Directors; Ronald G. Nahas;
Jack Arzoomanian, Chairman, Supervisory Committee;
William F. Brooks,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Oliver H. PERRY, II; Paul W. Ridenour;
Paula A. Geitner; Judith L. Hopper,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION; Frank J. Colson,
Mr., Chairman, Board of Directors; Lasalle Petty, Jr., Col.
Vice Chairman, Board of Directors; Leo M. Neff, Secretary
and Member Board of Directors; Woodrow W. Jenkins,
Treasurer and Member Board of Directors;
William J. Baldridge; Peter J. Orlik, Jr.; Ronald J.
Fitzgerald; Ronn M. Hamrah, Lt. Col.; Frederick Szwed,
Members, Board of Directors; Ronald G. Nahas, President;
Jack Arzoomanian, Chairman,
Supervisory Committee; William F. Brooks,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Judith L. HOPPER; Paul W. Ridenour;
Oliver H. Perry, II; Paula A. Geitner,
Plaintiffs-Appellants,
v.
ANDREWS FEDERAL CREDIT UNION;
Frank J. Colson; Lasalle Petty, Jr., Col. Vice Chairman,
Board of Directors; Leo M. Neff, Secretary and Member
Board of Directors; Woodrow W. Jenkins, Treasurer and
Member Board of Directors; William J. Baldridge;
Peter J. Orlik, Jr.; Ronald J. Fitzgerald;
Ronn M. Hamrah, Lt. Col.; Frederick Szwed,
Members, Board of Directors; Ronald G. Nahas,
President; Jack Arzoomanian, Supervisory Committee,
Defendants-Appellees,

National Credit Union Administration,
Amicus Curiae.

Nos. 88-2173, 88-2197 and 88-2198.
United States Court of Appeals,
Fourth Circuit.
Argued July 10, 1989.
Decided March 2, 1990.
Rehearing and Rehearing In Banc Denied Marcy 27, 1990.

Former employees of credit union brought action against credit union and individuals arising out of alleged adverse employment actions taken against them. The United States District Court for the District of Maryland, John R. Hargrove, J., dismissed claims and plaintiffs appealed. The Court of Appeals, Phillips, Circuit Judge, held that: (1) no implied right of action existed under Federal Credit Union Act; (2) no federal common-law cause of action accrued to

plaintiffs' benefit; and (3) because federal claims, as pleaded, were sufficiently substantial to invoke federal jurisdiction to inquire into their merits, district court improperly dismissed state law claims for lack of independent basis of jurisdiction.

Affirmed in part; vacated and remanded in part.

1. FEDERAL CIVIL PROCEDURE k1741
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1741 In general.

C.A.4 (Md.) 1990.

Mere claim in complaint that right exists under federal law suffices to avoid summary dismissal unless it is facially insubstantial or frivolous, and even nonfrivolous claim that remedy may be implied from federal statute will suffice.

2. FEDERAL CIVIL PROCEDURE k1742(1)
170A ----
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)2 Grounds in General
170Ak1742 Want of Jurisdiction
170Ak1742(1) In general.

Formerly 170Ak1742

C.A.4 (Md.) 1990.

If it is determined that federal court's jurisdiction fails because no federal claim exists, proper disposition is to dismiss on merits for failure to state claim rather than for want of subject matter jurisdiction.

3. FEDERAL COURTS k243

170B ----

170BIII Federal Question Jurisdiction

170BIII(D) Pleading

170Bk242 Sufficiency of Allegations

170Bk243 Particular cases.

C.A.4 (Md.) 1990.

Former credit union employees' federal claims under Federal Credit Union Act were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits. Federal Credit Union Act, Sec. 1 et seq., as amended, 12 U.S.C.A. Sec. 1751 et seq.

4. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

No express right of action existed under Federal Credit Union Act in favor of former credit union employees who claimed that improper adverse employment actions were taken against them. Federal Credit Union Act, Secs. 1 et seq., 110, 111, 113, as amended, 12 U.S.C.A. Secs. 1751 et seq., 1760, 1761, 1761b.

5. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

No implied right of action existed under Federal Credit Union Act in favor of former credit union employees who claimed that improper adverse employment actions were taken against them. Federal Credit Union Act, Sec. 1 et seq., as amended, 12 U.S.C.A. Sec. 1751 et seq.

6. BUILDING AND LOAN ASSOCIATIONS k24

66 ----

66k24 Powers, rights, and liabilities of associations in general.

C.A.4 (Md.) 1990.

There was no federal common-law cause of action accruing to benefit of former credit union employees who claimed that improper adverse employment actions were taken against them.

7. FEDERAL COURTS k18

170B ----

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk18 Validity or substantiality of federal claims and disposition thereof.

C.A.4 (Md.) 1990.

Where federal claims were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits, trial court's dismissal of state law claims for lack of independent basis of jurisdiction was improper; facially sufficient federal claims supplied adequate basis for trial court to exercise its discretion in determining whether to retain pendent jurisdiction over state law claims even though federal claims were dismissed on merits.

William J. Kenney (William J. Kenney & Associates, P.C., Washington, D.C., on brief), for plaintiffs-appellants.

Francis Joseph Nealon (Marianne P. Eby, Amy S. Owen, Miles & Stockbridge, Washington, D.C., Paul W. Grimm, Robert Smith, Jordan, Coyne, Savits & Lopata, Baltimore, Md., on brief), for defendants-appellees.

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

PHILLIPS, Circuit Judge:

Paul Ridenour, Oliver Perry, Paula Geidner, and Judith Hopper appeal the district court's order dismissing for lack of subject matter jurisdiction their claims against Andrews Federal Credit Union and several individual defendants relating to alleged adverse employment actions taken against them by the defendants. The appellants sought recovery on the ground that the credit union and some of its officers violated rights secured to them, in their capacity as shareholders-members of the defendant credit union, by the Federal Credit Union Act, 12 U.S.C. Secs. 1751 et seq. (FCUA). In addition, they alleged violations of Title VII, 42 U.S.C. Sec. 2000e, and breaches of state law tort and contract duties. The district court held that it lacked jurisdiction because the claims relating to the FCUA did not "arise under" federal law, the Title VII claims had not satisfied jurisdictional prerequisites, and no independent jurisdictional basis existed over the pendent state claims. We affirm dismissal of the federal claims, though on somewhat different grounds as to the claims under the FCUA. We remand the state claims for the court to determine whether to exercise pendent jurisdiction over them.

I

Until 1987, appellants Geidner, Hopper, and Perry were supervisory employees of the local Andrews Federal Credit Union, and appellant Ridenour served as Secretary-Treasurer of the credit union and on its board of directors. In their complaints in the district court, the appellants alleged that Ronald Nahas, the President of the credit union and one of the numerous individual defendants, had some time before

1986 adopted a pattern and practice of overt sexual harassment of credit union employees. Responding to complaints from employees under their supervision during 1986 and 1987, Geidner, Perry, and Hopper reported Nahas' allegedly offensive practices to Ridenour in his capacity as an officer and director of the credit union. After investigation and inquiry, Ridenour compiled a report concerning Nahas' conduct and, pursuant to federal regulations, submitted the report to the supervisory committee of Andrews Federal Credit Union.

In November 1987, the board of directors removed Ridenour from his position on the credit union's board of directors. Ridenour had been elected to a new three-year term in March 1987, but had not been renominated as Secretary-Treasurer. His removal from the Board instigated the various claims in this action. Ridenour himself alleged that his removal violated his rights as a credit union member under 12 U.S.C. Secs. 1760, 1761, and 1761b. Those sections of the Federal Credit Union Act, 12 U.S.C. Secs. 1751 et seq., he claimed, entitled him to remedies for violations of his rights to democratic governance of his credit union. Ridenour also asserted claims under Title VII, 42 U.S.C. Sec. 2000e and various state law causes of action. In a claim under the FCUA similar to Ridenour's, Geidner, Hopper, and Perry alleged "wrongful interference with [the] credit union's democratic governance" supposedly in violation of 12 U.S.C. Sec. 1760. They sought relief for the frustration of their credit union voting rights caused by the removal of Ridenour, for whom they had voted in the March 1987 board of directors election. In addition to some state law claims, Geidner, Hopper, and Perry also sued under Title VII, alleging that during 1987 they were either discharged or constructively discharged from their jobs at the credit union in retaliation for their role in pursuing the complaints against Nahas.

The district court dismissed the entire action for lack of subject matter jurisdiction. The court held that the claims invoking the FCUA did not "arise under" federal law because resolution of a federal question would play no significant role in the proceedings. It also held that none of the Title VII claims could support federal jurisdiction, because none of the plaintiffs had filed a timely charge with the Equal Employment Opportunity Commission, a jurisdictional prerequisite to a civil suit under Title VII. Finally, having found no independent basis for federal jurisdiction, the court held that it lacked the power to exercise pendent jurisdiction over the state law claims. This appeal followed, with appellants challenging only the dismissal of their FCUA and state-law pendent claims. (FN1)

II

We consider first the district court's jurisdictional dismissal of the claims alleging violations of rights secured by the FCUA.

A

Though the district court seems to have analyzed the jurisdictional issue as being whether the necessity to resolve substantial federal questions caused appellants' state-law claims to "arise under" federal law, see, e.g., Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9, 103 S.Ct. 2841, 2846, 77 L.Ed.2d 420 (1983); Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 41 S.Ct. 243, 65 L.Ed. 577 (1921), it is plain from the record that appellants' invocations of the provisions of the FCUA were by way of asserting federal causes of action allegedly conferred by or implicit in those provisions. Count I of Ridenour's complaint alleges that the defendants' actions in removing him from the Board of Directors of the credit

union "wrongfully and illegally interfered with [his] rights and duties pursuant to 12 U.S.C. Section 1761 and 1761b...." (FN2) Count II alleges wrongful interference with Ridenour's right, under 12 U.S.C. Sec. 1760, to a democratically governed credit union. (FN3) The other plaintiffs allege, inter alia, that they had voted for Ridenour's election to the Board of Directors and that his wrongful removal violated their Sec. 1760 rights to democratic governance of the credit union. All of the plaintiffs asked for damages and injunctive and declaratory relief for these statutory violations.

The appellee's challenge to the existence of federal question jurisdiction over these claims as pleaded is the classic one, that no such claims exist under federal law. To consider such a challenge requires a two-stage approach. At the threshold is the question whether the federal claim as pleaded is "so insubstantial, implausible, foreclosed by prior decisions of [the Supreme Court] or otherwise completely devoid of merit as not to involve a federal controversy" so that dismissal for lack of federal jurisdiction is warranted without more. Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 666, 94 S.Ct. 772, 776, 39 L.Ed.2d 73 (1974). If that cannot be said, the court of necessity has and must exercise jurisdiction to decide the federal question of whether the cause of action exists. See Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

[1] The preliminary jurisdictional test of facial insubstantiality is a rigorous one against the challenger. The mere claim that a right exists under federal law suffices to avoid summary dismissal unless it is facially insubstantial or frivolous, and even a non-frivolous claim that a remedy may be implied from a federal statute will suffice. See 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters Sec. 3562, at 40-41.

[2] If dismissal for facial insubstantiality is avoided, further inquiry into the existence of federal question jurisdiction of course turns on the existence of the underlying claim as pleaded. The existence of such a claim is of course a necessary predicate for the existence of federal jurisdiction over it. But if it is determined on this inquiry that jurisdiction fails because no such federal claim exists, the proper disposition is to dismiss on the merits for failure to state a claim rather than for want of subject matter jurisdiction. See Bell, 327 U.S. at 682, 66 S.Ct. at 776; Mount Healthy City Board of Education v. Doyle, 429 U.S. 274, 279, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977).

[3] Applying this approach, we cannot say as a preliminary matter that the appellants' allegations that federal law gives them causes of action are so wholly insubstantial or patently without merit as to preclude federal jurisdiction. Although we disagree with its holding, at least one federal court of appeals has found a federal cause of action for discharged credit union employees as a matter of federal common law. See Barany v. Buller, 670 F.2d 726 (7th Cir.1982). Because the appellants' contentions that federal law gives them a cause of action are not plainly insubstantial, we must take jurisdiction to address on the merits the federal question of the claims' existence thereby raised. We hold, however, that the asserted federal causes of action do not exist, and we will therefore affirm the district court's dismissal of these claims on the alternative ground that the appellants failed to state a claim upon which relief could be granted.

B

[4] [5] At the outset of our inquiry into the existence of the federal cause of action pleaded, we note that the appellants have not contended that any of the provisions of the FCUA cited in their complaint, 12 U.S.C. Secs. 1760,

1761 and 1761b, gives them an express right of action for the wrongs alleged. Our review of the statute satisfies us that, consistent with the holdings of every court to consider the question, no express right of action can be found in the statute. See, e.g., Barany v. Buller, 670 F.2d 726 (7th Cir.1982); Montford v. Robins Federal Credit Union, 691 F.Supp. 347 (M.D.Ga.1988); National Temple Non-Profit Corp. v. National Temple Community Federal Credit Union, 603 F.Supp. 807 (E.D.Pa.1985). Although the appellants' briefs do not frame their contentions in these terms, they have essentially argued that we might find either an implied right of action in the statute or that we should fashion such a cause of action as a matter of federal common law. As we discuss below, we see no warrant for recognizing a cause of action by resort to either approach.

(1)

The question whether an implied right of action may be found in federal statutes is basically guided by the multifactored test of Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). But at least since Touche Ross & Co. v. Redington, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979), it has been clear that the ultimate question will always be whether Congress intended to create the asserted cause of action, that the other Cort factors are merely subsidiary to that inquiry. See Thompson v. Thompson, 484 U.S. 174, 108 S.Ct. 513, 521, 98 L.Ed.2d 512 (Scalia, J., concurring) (1988); California v. Sierra Club, 451 U.S. 287, 293, 101 S.Ct. 1775, 1779, 68 L.Ed.2d 101 (1981); Transamerica Mortgage Advisors (TAMA) v. Lewis, 444 U.S. 11, 23-24, 100 S.Ct. 242, 249, 62 L.Ed.2d 146 (1979); Touche Ross, 442 U.S. at 575-76, 99 S.Ct. at 2488-89. We focus, then, on the evidence, if any, that Congress intended to create a cause of action for the kinds of wrongs alleged to

have occurred in Ridenour's removal from the board of directors.

The appellants appear to be correct in their general assertions that the statutory provisions under which they claim were designed to promote the democratic governance of their local credit unions. See LaCaisse Populaire Ste-Marie (St. Mary's Bank) v. United States, 563 F.2d 505, 509 (1st Cir.1977) (democratic control and management of credit unions significantly distinguishes credit unions from savings and loan institutions). It does not follow, however, from the general observation that Congress afforded members some opportunities to participate in the governance of their credit unions that it also intended to allow members to bring private actions for alleged irregularities in the management. The few courts to consider the issue have concluded that the FCUA does not imply a private right of action for wrongful removal from a managerial, supervisory, or employee position in a federal credit union. See, e.g., Barany, 670 F.2d at 730-31; Heiskala v. Johnson Space Center Federal Credit Union, 474 F.Supp. 448 (S.D.Tex.1979). Furthermore, the appellants have brought to our attention no positive indicia of legislative intent to create a cause of action. More significantly, our review of the statutory structure reveals two features of the statute that persuade us to the contrary that Congress intended not to create the asserted causes of action.

Section 1786 of the FCUA authorizes the Board of the NCUA to take a variety of administrative actions against federal credit unions and persons affiliated with them to safeguard the undoubted federal interest in the financial security of federal credit unions. See Amicus Curiae Brief of The National Credit Union Administration at 2-3. The Board may, for instance, terminate the insured status of credit unions, 12 U.S.C. Sec. 1786(a), issue cease and desist orders, Sec. 1786(f), or remove from office "institution-affiliated" parties such as officers and directors of local credit unions,

Sec. 1786(g)(1). When the Board removes a person from office pursuant to the power in Sec. 1786(g)(1), that person is entitled to an administrative hearing, Sec. 1786(g)(4), and to judicial review of the administrative ruling in the appropriate United States Court of Appeals or in the United States Court of Appeals for the District of Columbia Circuit, Sec. 1786(j)(2). Had Ridenour been removed by the Board of the NCUA, he presumably would have been able to avail himself of this remedial structure. But in Congress' decision to afford some protection to a credit union-affiliated party who is removed by the national Board, we see a strong negative inference that Congress did not deem the removal of a director by his fellow members on a local credit union's board sufficiently important to warrant creating a federal cause of action. (FN4)

Recent amendments to the FCUA provide even more immediate evidence of a lack of congressional intent to create the cause of action urged by appellants. In August 1989, the FCUA was amended in conjunction with a massive restructuring of federal law governing certain financial institutions. See Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRRE), Pub.L. No. 101-73, 1989 U.S.Code Cong. & Admin.News (103 Stat.) 183. Although the bulk of FIRRE was directed towards reforming the savings and loan industry, several of its provisions affected the NCUA. Most noteworthy for present purposes was Section 932 of FIRRE, which amended the NCUA to create a new cause of action for whistleblowers, now codified at 12 U.S.C. Sec. 1790b. In enacting that amendment, Congress recognized a need to protect all credit union employees who report violations of law to the national Board or to the Attorney General. (FN5) In light of the fact that Congress has so recently spoken to the question of credit union employee job protection, we are not prepared to find a congressional intent to allow a cause of action for discharge

or removal under circumstances other than those now specifically identified as the basis for private rights of action. Congress' silence on the subject during the enactment of FIRRE supports the view that it did not intend alleged violations of Secs. 1760, 1761, and 1761b to be the subject of private actions.

(2)

[6] Appellants also argue that there is federal subject matter jurisdiction over their claims because of the unique federal interests implicated by the governance and personnel policies of federal credit unions. As discussed above, we have jurisdiction to consider the jurisdictional argument because it raises nonfrivolous federal questions about the existence of the asserted causes of action. To the extent, however, that the appellants by their reliance on Barany v. Buller, 670 F.2d 726 (7th Cir.1982), may be suggesting that unique federal interests in this context should lead us to fashion a federal remedy as a matter of federal common law, we decline to do so. In so declining, we respectfully disagree with the contrary holding of the Seventh Circuit in Barany.

Though there is "no federal general common law," Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938), there is a recognized "need and authority" for federal courts to create specific federal common law in some carefully limited circumstances. Texas Industries v. Radcliff Materials, 451 U.S. 630, 640, 101 S.Ct. 2061, 2066, 68 L.Ed.2d 500 (1981). Broadly, the appropriate occasion may arise in two types of cases: where a federal rule of decision is "necessary to protect uniquely federal interests," id. (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964)), and where Congress has empowered the courts to fashion a body of substantive law, see, e.g., Textile

Workers v. Lincoln Mills, 353 U.S. 448, 456-57, 77 S.Ct. 912, 917-18, 1 L.Ed.2d 972 (1957). Only the first could possibly be present here, and we think it is not.

The category of unique federal interests justifying the creation of federal common law has been sharply circumscribed by the Supreme Court. Sufficient interests have been found only in cases involving "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty...." Texas Industries, 451 U.S. at 641, 101 S.Ct. at 2067.

Most critical here is the principle that when Congress has legislated on a question that is claimed to be appropriate for the creation of federal common law, courts must assume that Congress has articulated all of the governing federal standards. See, e.g., Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943) (federal common law may be invoked only "in absence of an applicable Act of Congress"); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 98 S.Ct. 2010, 2015, 56 L.Ed.2d 581 (1978) (when federal legislation "speak[s] directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."). See also, M. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv.L.Rev. 881, 925 (1986).

Application of that principle here precludes our undertaking any effort to fashion the body of federal common law urged by appellant. As noted in Part II B(1), Congress originally provided administrative and judicial remedies for a credit union-affiliated party when removed by the national Board, but in no other circumstances. More recently, Congress has amended the statute to create a remedy for whistleblowing employees and managers who report to the Board or to the Attorney General, but not when

the matter is handled by the local credit union's supervisory committee. Perhaps most significant of all may be the NCUA's choice not to give the bylaws that govern removal of board members the authority of an agency regulation: "Federal courts lack authority to impose more stringent [standards] under federal common law than those imposed by the agency charged by Congress with administering the comprehensive scheme." City of Milwaukee v. Illinois, 451 U.S. 304, 320, 101 S.Ct. 1784, 1794, 68 L.Ed.2d 114 (1981).

III

[7] As indicated, the district court dismissed all the state claims on the basis that once the federal claim was dismissed for lack of jurisdiction, so too must be the state claims because of their lack of any independent jurisdictional basis. As we have held, however, the federal claims under the FCUA were substantial enough as pleaded to invoke federal jurisdiction to inquire into their merits. That sufficed to support pendent jurisdiction over the state-law claims even if the federal claims were, as they should have been, then dismissed on the merits. See generally 13B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction and Related Matters Sec. 3564, at 74-75. Dismissal of the state-law claims for lack of an independent basis of jurisdiction was therefore improper. See Webb v. Bladen, 480 F.2d 306, 309-10 (4th Cir.1973). Although the court might have dismissed them in an exercise of its discretion under United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139, 16 L.Ed.2d 218 (1966), it did not of course purport to exercise that discretion. Though we might attempt to do so in the first instance, we do not think we should, but should instead remand to allow the district court to exercise its discretion on the matter. See Webb, 480 F.2d at 310. The usual rule--once indeed expressed as a flat

one, see Gibbs, 383 U.S. at 726, 86 S.Ct. at 1139--is that where federal claims are dismissed before trial, any pendent state claim should go out as well. But it is now recognized that there can be exceptions based upon unusual circumstances, such as statutes of limitation problems that warrant retention of the claims for resolution even after threshold dismissal of federal claims. See Rosado v. Wyman, 397 U.S. 397, 404-05, 90 S.Ct. 1207, 1213-14, 25 L.Ed.2d 442 (1970) (amount of time and energy already expended a factor to be considered). We are in no position to know whether there might be any such reasons here for going against the usual rule of dismissal in threshold stages. Accordingly we will remand the state-law claims to the district court for determination there whether they should be dismissed without prejudice or retained for resolution under the pendent jurisdiction.

IV

In summary, we affirm dismissal of the Title VII and FCUA claims, but we vacate that part of the judgment dismissing the FCUA claims on jurisdictional grounds and remand for entry of a judgment dismissing them on the merits. We vacate that part of the judgment dismissing the state-law claims for lack of jurisdiction and remand those claims for determination whether they should be dismissed without prejudice or retained for decision under the pendent jurisdiction.
SO ORDERED.

FN1. Apart from unhelpful conclusory statements that federal courts have jurisdiction to hear such claims, the appellants have not challenged the district court's critical ruling that no EEOC complaint was ever filed by any of the plaintiffs. This unchallenged finding supports dismissal of all the Title VII claims.

FN2. Ridenour does not specifically identify which provisions of 12 U.S.C. Secs. 1761 and 1761b give him the right of action he asserts. Title 12 U.S.C. Sec. 1761 establishes the management structure of credit unions and contains provisions relating to the composition of the board, supervisory committee, and the credit committee and to compensation for board and committee members:

> (a) The management of a Federal credit union shall be by a board of directors, a supervisory committee, and where the bylaws so provide, a credit committee. The board shall consist of an odd number of directors, at least five in number, to be elected annually by and from the members as the bylaws provide. Any vacancy occurring on the board shall be filled until the next annual election by appointment by the remainder of the directors.
>
> (b) The supervisory committee shall be appointed by the board of directors and shall consist of not less than three members nor more than five members, one of whom may be a director other than the compensated officer of the board. A record of the names and addresses of the executive officers, members of the supervisory committee, credit committee, and loan officers, shall be filed with the Administration within ten days after their election or appointment.

(c) No member of the board or of any other committee shall, as such, be compensated, except that reasonable health, accident, similar insurance protection, and the reimbursement of reasonable expenses incurred in the execution of the duties of the position shall not be considered compensation.

12 U.S.C. Sec. 1761b provides a partial listing of the powers and duties of the board of directors of a Federal credit union:

> The board of directors shall meet at least once a month and shall have the general direction and control of the affairs of the Federal credit union. Minutes of all meetings shall be kept. Among other things, the board of directors shall--
>
> (1) act upon applications for membership or appoint membership officers from among the members of the credit union, other than the board member paid as an officer, the financial board officer, any assistant to the paid officer of the board or to the financial officer, or any loan officer;
>
> (2) provide adequate fidelity coverage for officers and employees having custody of or handling funds according to regulations issued by the Board;

(3) fill vacancies on the board of directors until successors elected at the next annual meeting have qualified;

(4) if the bylaws provide for an elected credit committee, fill vacancies on the credit committee until successors elected at the next annual meeting have qualified;

(5) appoint the members of the supervisory committee and, if the bylaws so provide, appoint the members of the credit committee;

(6) have charge of investments including the right to designate an investment committee of not less than two to act on its behalf;

(7) determine the maximum number of shares, share certificates, and share draft accounts, and the classes of shares, share certificates, and share draft accounts;

(8) subject to any limitations of this subchapter, determine the interest rates on loans, the security, and the maximum amount which may be loaned and provided in lines of credit;

(9) authorize interest refunds to members of record at the close of business on the last day of any dividend period from income earned and received in proportion to the interest paid by them during that dividend period;

(10) if the bylaws so provide, appoint one or more loan officers and delegate to these officers the power to approve or disapprove loans, lines of credit, or advances from lines of credit;

(11) establish the par value of the share;

(12) subject to the limitations of this title and the bylaws of the credit union, provide for the hiring and compensation of officers and employees;

(13) if the bylaws so provide, appoint an executive committee of not less than three directors to act on its behalf and any other committees to which it can delegate specific functions;

(14) prescribe conditions and limitations for any committee which it appoints;

(15) review at each monthly meeting a list of approved or pending applications for membership received since the previous monthly meeting together with such other related information as it or the bylaws require;

(16) provide for the furnishing of the written reasons for any denial of a membership application to the applicant upon the written request of the applicant;

(17) in the absence of a credit committee, and upon the written request of a member, review a loan application denied by a loan officer;

(18) declare the dividend rate to be paid on shares, share certificates, and share draft accounts pursuant to the terms and conditions of section 1763 of this title;

(19) establish and maintain a system of internal controls consistent with the regulations of the Board;

(20) establish lending policies; and

(21) do all other things that are necessary and proper to carry out all the purposes and powers of the Federal credit union, subject to regulations issued by the Board.

FN3. Title 12 U.S.C. Sec. 1760 provides for meetings of credit union members and establishes voting rights and procedures:

> The fiscal year of all Federal credit unions shall end December 31. The annual meeting of each Federal credit union shall be held at such place as its bylaws shall prescribe. Special meetings may be held in the manner indicated in the bylaws. No member shall be entitled to vote by proxy, but a member other than a natural person may vote through an agent designated for the purpose. Irrespective of the number of shares held, no member shall have more than one vote.

FN4. Indeed, even the NCUA's Board has made it its policy not to become involved in disputes concerning the democratic governance of local credit unions "unless the matter also presents an issue regarding the financial safety and soundness of the operation of the credit union." Amicus Curiae Brief of the National Credit Union Administration at 2. This policy choice is reflected in the Board's decision not to seek to give the bylaws governing the internal administration of credit unions the effect of agency regulation. Id. at 9.

FN5. Even had the appellants sued under this new cause of action, they would have failed to state a claim since they have not alleged that they reported possible violations of law to the NCUA Board or to the Attorney General.

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June 23, 2000

BY FEDERAL EXPRESS

Patricia S. Connor, Clerk
United States Court of Appeals
for the Fourth Circuit
1100 E. Main Street
Richmond, VA 23219

Re: New Horizon of NY, LLC v. Robert Jacobs, et al.
Nos. 99-1990 & 99-1996 (Consolidated)

Dear Ms. Connor:

On June 9, 2000, the Appellee submitted a letter to the Court pursuant to Rule 28(j) of the Federal Rules of

Appellate Procedure. This letter provides additional citations responding to that letter: Manway Constr. Co. v. Housing Authority of Hartford, 711 F.2d 501 (2d Cir. 1983); Equal Employment Opportunity Comm'n v. Local 40, 76 F.3d 76 (2d Cir. 1996).

During oral argument held on June 6, 2000, Judge Motz also inquired where in the record it appears that the defendants made the argument that an appeal with a legitimate basis in law cannot be the basis for tort or contract liability under the Noerr-Pennington doctrine. The following is a list of the record references to the substantive argument that the appeal was legally justified and cannot, therefore, be the basis for liability.

- Defendants Lane, Rosen, Scharf and DaPuzzo's Memorandum in Support of Their Motion for Summary Judgment (J.A. 39T, docket entry 215), at 3-12.
- Plaintiff's Memorandum in Opposition to Motions for Summary Judgment of Defendants Lane, *et al.*, and in Support of Cross-Motion for Partial Summary Judgment (J.A. 39W, docket entry 259), at 19-26, 43-44.
- Memorandum of Defendants Ira Born, David Queller and David Queller, Inc. In Support of Motion for Summary Judgment (J.A. 39T, docket entry 221) at 14, ("Whether or not the appeal prevailed, if it had merit, or even if the appellants reasonably believed it had merit, Plaintiff has no case.").
- Memorandum of Authorities for Defendants Lane, *et al.*, (J.A. 13, docket entry 51), at 2-6.
- Plaintiff's Memorandum of Authorities on the Contested Issues of Law (J.A. 12, docket entry 75), at 3 note 2.
- Amended Trial Memorandum of Defendants Robert Jacobs, *et al.* (J.A. 13, docket entry 51), at 3 note 2.
- Pretrial Order (J.A. 131, 333-35), at 23, 25A, 25B, 25C.

The Noerr and Pennington cases were not specifically cited by the defendants. (In Cardtoons, L.C. v. Major League Baseball Players Association, 209 F.3d 885 (10th Cir. 2000), the Court of Appeals for the Tenth Circuit observed that the Noerr and Pennington precedents are not suitable authorities of the First Amendment claim outside antitrust law.) The sufficiency of such argument to warrant consideration by this Court is supported by Eberhardt v. Integrated Design & Construction, Inc., 167 F.3d 861, 866 n.1 (4th Cir. 1999); Finn v. Schiller, 72 F.3d 1182, 1190 (4th Cir. 1996). The issue is a question of law, and refusal to consider it would result in a miscarriage of justice. Skinner v. City of Miami, 62 F.3d 344, 348 (11th Cir. 1995) cert. denied, 520 U.S. 1165 (1997); Roberts v. Van Buren Public Schools, 773 F.2d 949, 955 (8th Cir. 1985).

Enclosed for filing are the original and four copies of this letter. I would appreciate your returning to me a file-stamped copy in the enclosed, pre-paid envelope. Thank you for you assistance. Should you have any questions, please call me at (202) 293-6400.

Sincerely,

Nathan Lewin

cc: Charles R. Holton, Esq.
James G. Exum, Jr., Esq.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED

Nov 14 10 01 AM '00

U.S. COURT OF APPEALS
FOURTH CIRCUIT

Nos. 99-1990, 99-1996

NEW HORIZON OF NEW YORK, LLC
Plaintiff-Petitioner,

v.

ROBERT JACOBS; ELLIOT JACOBS; ALLAN MIRWIS; E.J. SERVICING, INC.; E.J. REALTY MANAGEMENT CORP.; E.J. PROPERTY CONSULTANTS; DAVID QUELLER; DAVID QUELLER, INC.; IRA BORN; STANLEY LANE, M.D.; PETER DAPUZZO; CONSTANCE ROSEN, Executrix of the Estate of HOWARD ROSEN, M.D.; and RUTH SCHARF,
Defendants-Respondents.

On Appeal from the United States District Court for the Eastern District of North Carolina Western Division

PETITIONER'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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COUNSEL'S STATEMENT OF PURPOSE

The opinion issued by a panel of this court on November 2, 2000, *New Horizon of NY LLC v. Jacobs*, ____ F.3d ____ (4th Cir. 2000) (the "Opinion") vacated the judgment of the district court and remanded the matter to the district court for dismissal without prejudice for lack of subject matter jurisdiction. The opinion overlooked or misapplied several material points of law. These are as follows:

1. The panel overlooked petitioner New Horizon's argument that federal question jurisdiction existed in this case pursuant to this court's precedent and 18 U.S.C. § 401, and that the district court properly exercised supplemental jurisdiction over the state law claims.

2. The panel based its conclusion regarding the merits of the federal contempt claim on an incorrect analysis of collateral estoppel which was, in any event, not material to the issue of "related to" jurisdiction.

3. The panel misapplied the proper standard for determining "related to" jurisdiction over the state law claims.

These points must be considered in order to afford New Horizon a full and fair resolution of this appeal.

PETITION FOR REHEARING

I. THE PANEL OVERLOOKED PETITIONER'S ARGUMENT THAT THE DISTRICT COURT HAD FEDERAL QUESTION SUBJECT MATTER JURISDICTION OVER THE CONTEMPT CLAIM AND PROPERLY EXERCISED SUPPLEMENTAL JURISDICTION OVER THE PENDENT STATE LAW CLAIMS.

A. The existence of federal question jurisdiction pursuant to this court's precedent and 18 U.S.C. § 401 was argued to the court and supported with supplemental authorities after argument.

At oral argument on June 6, 2000, the panel questioned whether there were bases for federal question subject matter jurisdiction, other than the "related to" jurisdiction specifically advanced by petitioner and contested by respondent. Counsel responded that the civil contempt claim provided an independent basis for federal question jurisdiction. The panel further suggested the doctrine of supplemental or pendent jurisdiction over the state law claims.

On June 12, petitioner filed supplemental authorities in a non-argumentative format pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure and Local Rule 28(e). The authorities supported petitioner's argument that the contempt claim for damages provided an independent basis for federal question jurisdiction, and that the district court also had supplemental jurisdiction over the state law claims. On June 23, 2000, the appellants responded to the June 12 submission, citing two cases on the jurisdictional issue.

Notwithstanding the two distinct arguments made to support the existence of subject matter jurisdiction, the panel held only that "the district court did not have related to jurisdiction under 28 U.S.C. § 1334 in this case." Opinion at 21. At footnote 17, the panel mistakenly observed that "[o]ther federal question jurisdiction or diversity of citizenship is not claimed in this case." *Id.* at 13 n.17. The panel therefore failed to consider the other compelling basis for federal question jurisdiction advanced by the petitioner.[1]

B. Federal question jurisdiction exists pursuant to this court's precedent and 18 U.S.C. § 401.

This court has recognized the federal cause of action for damages resulting from civil contempt. *In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995), and cases cited therein; *Folk v. Wallace Business Forms, Inc.*, 394 F.2d 240, 244 (4th Cir. 1968) ("No one seriously questions the right of the Court to award civil contempt damages which have long been recognized"). In addition, 18 U.S.C. § 401 vests jurisdiction in the U.S. courts to enforce their own orders -- "[a] court of the United States shall have power to punish . . . contempt of its authority, and none other . . . ." 18 U.S.C. § 401. The district court, therefore, had exclusive jurisdiction to determine the appropriate remedy for violation of the order of the bankruptcy court, as the order in question was issued by the bankruptcy court as a "unit" of the district

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[1] Having been raised by counsel and the panel at oral argument and supported with the Rule 28(j) submission, the additional basis for federal subject matter and supplemental jurisdiction is properly before this court and should have been considered. The argument was also previously advanced by New Horizon below in response to respondents' motion to dismiss for lack of subject matter jurisdiction. In any event, 28 U.S.C. § 1653 would permit amendment of the pleadings were it found to be necessary.

court. *See United States v. Guariglia*, 962 F.2d 160, 163 (2d Cir. 1992) (bankruptcy court order deemed issued by a "unit" of the district court).

C. The district court properly exercised supplemental jurisdiction over the pendent state law claims.

The federal contempt claim, as pled, was at least substantial enough to cause the district court to address its merits and to exercise supplemental jurisdiction over the pendent state law claims which derive from a common nucleus of operative fact. 28 U.S.C. § 1367(a); *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966).[2] This court applied that principle in *Ridenour v. Andrews Federal Credit Union*, 897 F.2d 715 (4th Cir. 1990), a case cited and forwarded to the court in the Rule 28(j) submission. In *Ridenour*, the district court dismissed the federal count for lack of jurisdiction and subsequently dismissed the state law claims for lack of any independent jurisdictional basis. This court upheld dismissal of the federal claim, but vacated the portion of the judgment dismissing the state law claims and remanded for the district court to exercise its discretion to retain the state law claims under pendent jurisdiction, or to dismiss those claims without prejudice.

In *Ridenour*, the merits dismissal of the federal claim occurred before trial when it appeared that there was no express or implied right of action under the federal statute asserted by the plaintiffs for the alleged wrongs. This court

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[2] It cannot be and has never been argued that the asserted state law claims are separate and distinct in their operative facts from the contempt count. Indeed, the federal claim is addressed to the appellants' contempt of the same Confirmed Plan that is central to the interrelated state law claims for breach of contract and business torts. (J.A. 65-66, 1264, 1272-1273, 1650-1651, 2648-2650, and 2773.)

cited to substantial authority that because the federal claims were sufficient enough as pled to invoke federal jurisdiction to inquire into their merits, they were also sufficient to support pendent state law claims.[3] *Id.* at 715.

The case *sub judice* is even more compelling than *Ridenour*. Here, the federal contempt claim is indeed one recognized by statute and case law from this circuit, and it survived numerous procedural and substantive challenges before two lower courts. Although the district court ultimately found in respondents' favor on the contempt claim, that was only after a full merits trial.

Petitioner has failed to locate any authority whatsoever that would support this court's dismissal of the pendent state law claims after trial and where the claim upon which federal jurisdiction rested received a trial on the merits. Nor is there any authority for the dismissal of this entire case based upon this court's merits analysis that the contempt claim was collaterally estopped. *See* discussion *infra* at 8-9. The collateral estoppel defense focused upon by the court is no more dispositive of the jurisdictional question than was the *Ridenour* plaintiffs' failure have had any statutory right of action at all. Yet, in *Ridenour*, even though dismissal of the unmeritorious federal claim occurred before trial, this court saw fit to allow the district court to exercise its discretion to retain the pendent state claims for trial. *See* 28 U.S.C. § 1367(c) ("district courts may decline to exercise supplemental jurisdiction"). There has been no proviso for the exercise of similar discretion in the case at hand.

Shanaghan v. Cahill, 58 F.3d 106 (4th Cir. 1995) is also instructive. There this court reversed the district court's

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[3] It is instructive that the federal claim asserted in *Ridenour* which was sufficient enough for a merits inquiry turned out not to be grounded in any express or implied statutory right of action. *Id.* at 719-21. In spite of that fatal flaw, this court deemed the failed federal count sufficient to support the pendent state claims.

dismissal of the pendent state law claims once the judge had found that the basis for federal diversity jurisdiction no longer existed. This court emphasized that the district judge had the discretion to retain the state law claims and had the obligation to exercise that discretion, enjoying "wide latitude" in so doing. *Id.* at 110. Among the factors which this court noted to be considered were "the amount of time and energy that has already been expended," as well as "convenience and fairness to the parties" and "the interests of judicial economy." *Id.* at 110, 112. Surely these factors would require retention of supplemental jurisdiction in the case at hand.

The panel's manifest failure to acknowledge this additional legitimate and compelling basis for federal question subject matter jurisdiction and supplemental jurisdiction has resulted in an extraordinary and unfair outcome. This court must therefore vacate its order and reinstate the district court judgment with respect to which it had federal subject matter and pendent jurisdiction.

II. THE PANEL BASED ITS CONCLUSION REGARDING THE MERITS OF THE FEDERAL CONTEMPT CLAIM ON AN INCORRECT ANALYSIS OF COLLATERAL ESTOPPEL WHICH WAS, IN ANY EVENT, NOT MATERIAL TO THE ISSUE OF "RELATED TO" JURISDICTION.

A. Appellants never pled, preserved for appeal, or briefed the collateral estoppel defense as a basis to defeat federal "related to" jurisdiction, and the panel misapplied the governing law.

The panel stated "it is patent that the civil contempt count, on which New Horizon bases its claim in this case of

related to jurisdiction under § 1334, is nothing more nor less than a collateral attack on the order of the bankruptcy court of February 6, 1997." Opinion at 16. This conclusion, which was the primary support for the panel's decision, was based on the application of the affirmative defense of collateral estoppel, which was never pled, preserved by appellants as an argument on appeal, nor briefed by the appellants. As a result, petitioner has heretofore never had any opportunity to brief this issue to this court.

The panel's determination wholly disregarded the decision of the bankruptcy judge that he had never previously considered the allegations underlying the contempt motion and did not adjudicate it. *See* Opinion at 10 n.13. This court has observed that "a bankruptcy court's interpretation of its own order . . . warrants 'customary appellate deference.' The bankruptcy court was 'in the best position to interpret its own orders.'" *Colonial Auto Center v. Tomlin* (*In re Tomlin*), 105 F.3d 933, 941 (4th Cir. 1997) (quoting *Texas N.W. Ry. Co. v. Atchison, Topeka and Santa Fe Ry. Co.*, 860 F.2d 267, 272 (7th Cir. 1988)). In *Tomlin*, this court observed that the bankruptcy court's direct engagement in the earlier proceedings and its "better vantage point" make it best qualified to make determinations with respect to its earlier orders. *Tomlin*, 105 F.3d at 941. Here, the panel ignored this principle of appellate restraint and actually criticized the bankruptcy judge for exercising the "luxury of hindsight" in interpreting his own prior order. Opinion at 16. What else besides "hindsight" does a trial judge have to interpret his prior order as to what was or was not a basis for his decision?

Finally, in its peremptory conclusion that collateral estoppel applied to bar the contempt of court claim, this court ignored the black-letter law that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Arizona v.*

California, 120 S. Ct. 2304, 2319 (2000), citing Restatement (Second) of Judgments § 27, p. 250 (1982).

There has been no showing whatsoever that the order entered by the bankruptcy court on February 6, 1997 was, in fact, an adjudication on the merits of New Horizon's subsequent damages claim for civil contempt. Indeed, New Horizon's motion, which precipitated the February 6 Order, sought only an order directing the appellants to appear and show cause why they should not be held in contempt. In denying the motion at that time, the bankruptcy judge held only that he would not order the defendants to appear and show cause. There is no reason to suggest that either the bankruptcy judge, or later the district court judge, could not subsequently determine, based upon substantial additional evidence obtained through discovery and presented to the court, that the appellants should, indeed, appear and show cause why they were not liable for civil contempt. This is precisely what the lower courts did.

B. The panel's focus on the merits of collateral estoppel was immaterial to the issue of jurisdiction.

Whether the panel was right or wrong on the merits of the application of the collateral estoppel doctrine to the civil contempt claim is immaterial to the question of whether "related to" jurisdiction exists.[4] This panel made an improper leap of logic to find that because they concluded that the claim was barred by collateral estoppel, there was no jurisdiction for the trial court to hear the claim in the first place. *Spartan Mills v. Bank of America Illinois*, 112 F.3d

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[4] The district court ultimately found in respondents' favor on the contempt claim on other grounds, and petitioner did not appeal from that judgment. Thus, the merits of that claim were not even before this court.

1251 (4th Cir. 1997), *cert. denied*, 522 U.S. 969 (1997), cited by the panel, actually demonstrates this point.

In *Spartan Mills*, this court held that it would not permit a collateral attack in the United States District Court for the District of South Carolina on a prior order of the United States Bankruptcy Court for the Southern District of Florida. This court did not hold, however, that the United States District Court for the District of South Carolina lacked jurisdiction to hear the claim. Rather, it merely upheld the district court's determination on the merits that the claim was barred by collateral estoppel.

Likewise, *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995), also relied on by the panel, shows a similar result. There the Supreme Court clearly articulated the broad standards for "related to" jurisdiction in the bankruptcy court and held that a district court could not collaterally attack the decision of the bankruptcy court. 514 U.S. at 313. The court did not hold that the district court lacked jurisdiction to hear the claim or any other pendent state law claims. In the present case there is no support for the panel's logical jump from a collateral estoppel defense to a conclusion of lack of subject matter jurisdiction.

III. THE PANEL MISAPPLIED THE PROPER STANDARD FOR DETERMINING "RELATED TO" JURISDICTION AND IMPROPERLY APPLIED A RETROSPECTIVE ANALYSIS TO REACH ITS CONCLUSION THAT "RELATED TO" JURISDICTION DID NOT EXIST.

A. The standard for "related to" jurisdiction.

This court has adopted the majority standard for determining "related to" jurisdiction, which is stated as follows:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property.

In re Celotex Corp., 124 F.3d 619, 625 (4th Cir. 1997) (citations omitted) (emphasis in original).

New Horizon's claims went to the heart of the Confirmed Plan that was under administration by the bankruptcy court at the time the lawsuit was filed. The related to test does not require "certain or likely alteration of the debtor's rights, liabilities, options or freedom of action . . . [but only] [t]he possibility of such alteration or impact." *Id.* at 626 (citing *In re Titan Entergy, Inc.*, 837 F.2d 325, 330 (8th Cir. 1988)).

B. The analysis of "related to" jurisdiction must consider the facts as they existed at the time of filing.

This circuit has applied the rule that if "related to" jurisdiction existed at the commencement of the action, a later event in the bankruptcy proceeding can not divest the court of subject matter jurisdiction that it once had. *Celotex*, 124 F.3d at 626 (citing *Freeport McMoRan, Inc. v. K N Energy Inc.*, 498 U.S. 426, 428 (1991) ("if jurisdiction exists ***at the time an action is commenced***, such jurisdiction may not be divested by subsequent events") (emphasis added)). This court acknowledged in *Celotex*, therefore, that its "analysis may not be informed by our knowledge of the Confirmed Plan or Rapid's settlement with the Celotex bankruptcy estate." *Celotex*, 124 F.3d at 626.

Here, the panel ignored these basic principles and considered events that occurred in connection with the bankrupt estate **after** the commencement of this litigation in February 1997, and on that basis divested the district court of the subject matter jurisdiction that it had. At page 20 of the Opinion, the panel stated that it was basing its finding upon such facts that the notes were sold to another purchaser in September 1997 for a higher price (yielding a benefit to the Tudor estate),[5] and that "the AJ estate was settled months before, and unaffected by the **trial** in this case" (emphasis added). Opinion at p. 20. The question before the court was not whether the outcome of the New Horizon trial did have an effect on the debtor's estate, as implied by the panel's comments, but rather whether the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy, as of the time of filing. *Celotex*, 124 F.3d at 625.

C. At the time of filing of the complaint, it was clear that the outcome of the proceeding could have a conceivable effect on the AJ Estate in bankruptcy.

At the time of filing this lawsuit in February 1997, the AJ Confirmed Plan was in the midst of administration, with the primary source of funding having been lost because of the failure of the sale of the notes to New Horizon. The notes still had to be sold to someone in order to fund and effectuate the Plan. New Horizon, along with others, continued to be a leading candidate to purchase the notes.

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[5] The very suggestion of this fact highlights the error in the panel's analysis. What if the notes were sold in September 1997 for less than what New Horizon was prepared to pay? Certainly this would impact the Tudor and the AJ estates. Standing in February 1997, this possibility was every bit as conceivable as what actually occurred.

New Horizon asserted in the complaint that the defendants had breached the contract – the Confirmed Plan – which breach caused its exclusive option to fail. It was conceivable, at the time of filing, that the defendants would raise any or all of the following defenses to that claim:

1. that they were forced by duress to consent to the Plan, and, therefore, the Plan was invalid;
2. that the Plan required an interpretation whereby the notes could only be sold with financing of no more than seventy-seven percent (77%) of the cash flow of the underlying properties;
3. that the Plan was unenforceable because of the unclean hands of the Plaintiff, or its managers;
4. that New Horizon was not an acceptable or permissible purchaser of the notes because a sale to New Horizon would lead to income tax recapture; and
5. that there was no specific or definite provision of the Order Confirming Plan that had been violated with regard to New Horizon's contempt count.

Given these positions, ***all of which the defendants actually argued to the bankruptcy court and/or the trial court*** (J.A. 2817-24, 79, 125-28, 130, 132, 334, 345-49, 2655-56), it was entirely conceivable at the commencement of this lawsuit that the outcome of this case could have considerable effect on the AJ Plan then being administered. Consider the following:

- What if the lower court ruled that the Plan was void for duress or illegality?
- What if the lower court ruled that New Horizon could not be a purchaser of the notes because of purported concerns for tax recapture?
- What if the lower court ruled that a sale was violative of the Plan if it involved financing greater than 77% of cash flow?

Surely it can be understood that rulings such as these could and would have a direct and substantive effect on the Plan which was then in process of being administered.
Surely it cannot be this Circuit's position that issues such as these must be litigated in state court, while the bankruptcy Plan is in the process of being administered. These circumstances are what the courts below appreciated during the pendency of this lawsuit when they properly found the existence of "related to" jurisdiction. The panel's improper retrospective analysis led to its erroneous conclusion that "related to" jurisdiction did not exist.

CONCLUSION AND SUGGESTION FOR REHEARING *EN BANC*

Based on the foregoing, Petitioner New Horizon of NY requests that the Court rehear this appeal, and suggests that this rehearing occur *en banc*.

Respectfully submitted,
This 13th day of November, 2000.

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CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner hereby certifies that two copies of the foregoing **Petitioner's Petition for Rehearing and Suggestion for Rehearing *en Banc*** for New Horizon of New York, LLC were served this 13th day of November, 2000, upon the following by Federal Express delivery:

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